

RECONCILING DISPOSSESSION?:
THE LEGAL AND POLITICAL ACCOMMODATION OF
NATIVE TITLE IN CANADA AND AUSTRALIA

by

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ABSTRACT

Because increasing numbers of Indigenous people are choosing to work within the legal and political institutions of their colonisers to achieve native title recognition and respect, a critical question is: can (post-)colonial legal and political institutions meaningfully redress the historic and ongoing dispossession of Indigenous Peoples or does the colonial nature of these institutions inherently predispose them to (intentionally or unintentionally) perpetuate dispossession? This study seeks to answer this critical question by analyzing the legal and political accommodation of native title in Canada and Australia using the neo-institutional lens of path dependence as an explanatory analytic framework.

In sum, characterizing native title's legal and political accommodation as a self-reinforcing path dependent sequence, this study argues that the different degrees of recognition and accommodation afforded native title by the legal and political institutions of (post-)colonial Canada and Australia can be meaningfully explained with reference to these countries' different (and historically contingent) recognition and accommodation of indigenous rights to land during their earliest years of colonial settlement. This interpretation of events not only provides a meaningful explanation for colonial history's continuing role in the legal and political accommodation of native title in Canada and Australia, it also provides a meaningful explanation for this study's four central findings: (i) the legal and political *recognition* of native title is relatively more extensive and

secure in the Canadian case than it is in the Australian case; (ii) the judicial *construction* of native title at common law has produced a relatively stronger real property right in the Canadian case than it has in the Australian case; (iii) Canada's comprehensive claims policy has given Indigenous Peoples a relatively stronger ability to assert and defend claims of continuing native title than has Australia's *Native Title Act*; and, (iv) the ability of Indigenous Peoples to procure formal legal and/or political *confirmation* of their unique territorial rights (i.e. continuing native title) is little different today than it was prior to the recognition of native title at common law and the subsequent recognition of native title in central government policy.

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GLOSSARY OF LEGAL TERMS

- Actual Possession:*** direct occupancy, use and/or control of real property.
- Adverse Possession:***
- (a) actual possession of another's real property that is open, hostile, exclusive, continuous, and adverse to the claim of the owner. May give rise to legal title in the possessor if carried out for a specific statutory period;
 - (b) possession of land, with out legal title, for a period of time sufficient to become recognized as legal owner;
 - (c) a method of acquiring legal title in the absence of a legal instrument.
- Beneficial Interest:*** a right to use, benefit, and profit from property and/or its distribution.
- Constructive Possession:*** possession that exists by virtue of a legal instrument (as by title) rather than by direct occupancy or control.
- Defeasible Interest:*** an interest subject to condition(s) and/or limitation(s) (such as a 'right to entry').
- Equitable Interest:*** a right amenable to equitable relief (i.e. positive remedies) if unlawfully infringed.
- Equitable Title:***
- (a) title vested in one who is considered by the application of equitable principles to be the owner of property even though legal title is vested in another;
 - (b) the right to receive legal title upon the performance of an obligation.
- Exclusive Possession:***
- (a) possession that exists by virtue of occupancy, use and/or control of real property to the exclusion of all others;
 - (b) a method of acquiring legal title in the absence of a legal instrument.
- Fungible Property:*** property comprised of many identical parts which can be easily replaced by other, identical property.

<i>Hostile Possession:</i>	occupancy of a piece of real property coupled with a claim of ownership (which may be implied by actions, such as erecting a fence) over anyone, including the holder of legal title. It may be an element of gaining title through long-term adverse possession or claiming real property that has no known owner.
<i>Interest:</i>	a right, claim or share in property (compare with ‘title’).
<i>Legal Interest:</i>	a right conferred by legal title.
<i>Legal Title:</i>	title that is deemed or recognized as constituting valid ownership (as by virtue of an instrument) even if not accompanied by possession or use.
<i>Native Title:</i>	also termed ‘aboriginal title’, ‘Indian title’ and ‘traditional title’: (a) a <i>sui generis</i> real property right, recognized but not created by the common law, that is uniquely applicable to Indigenous Peoples/people and to traditional Indigenous territories; (b) the judiciously defensible rights and interests (personal and/or proprietary) of Indigenous Peoples/people in respect of their traditional territories.
<i>Paramount Title:</i>	title that renders inferior any other title to the property.
<i>Peaceable Possession:</i>	holding property without any adverse claim to possession or title by another.
<i>Personal Interest:</i>	also termed ‘derivative right’: qualified legal and non-equitable or defeasibly equitable personal (i.e. non-proprietary) right to delineated tracts of land held of the Crown (e.g. leasehold tenures).
<i>Personal Property:</i>	also termed: ‘personal effects’; ‘movable property’; ‘goods and chattel’; and, ‘personality’: (a) property that is moveable (i.e. all property other than: land; buildings, crops and other resources still attached to or within the land; and, improvements or fixtures permanently attached to the land or permanently attached to a structure on the land); (b) an interest, benefit, right or privilege in such property.

<i>Plenum Dominium:</i>	also termed 'royal demesne': (a) unqualified paramount title held by the Crown; (b) unqualified legal and equitable proprietary right to all real property within the Crown's sovereign jurisdiction.
<i>Possession:</i>	the act, fact or condition of owning, occupying, holding or controlling property.
<i>Possessory Interest:</i>	a right involving or arising out of possession.
<i>Proprietary Tenure:</i>	also termed 'common law estate', 'proprietary estate', 'common law title' or 'equitable estate': unqualified legal and equitable proprietary right to delineated tracts of land held of the Crown (e.g. title in fee simple).
<i>Property:</i>	something that is owned or possessed.
<i>Radical Title:</i>	also termed 'underlying title': (a) qualified paramount title held by the Crown; (b) legal and equitable proprietary right to all real property within the Crown sovereign jurisdiction subject to or burdened by Indigenous Peoples' pre-existing rights to the same land.
<i>Real Property:</i>	also termed: 'real estate' and 'immovable property': (a) property that is immovable (i.e. property consisting of: land; buildings, crops or other resources still attached to or within the land; and improvements or fixtures permanently attached to the land or permanently attached to a structure on the land); (b) an interest, benefit, right or privilege in such property
<i>Sui Generis:</i>	(a) unique; (b) of its own kind; (c) constituting a class alone; (d) peculiar.
<i>Title</i>	the quality of ownership as determined by a body of facts and events; the means or right by which one owns and possess property generally (compare with 'interest')
<i>Vested Interest:</i>	an interest with no condition(s) or limitation(s), not even the recipients, except the natural end of the present estate

A NOTE ON THE AUTHOR'S USE OF TERMINOLOGY

INDIGENOUS PEOPLES:

The term 'Indigenous Peoples' is arguably the most universally accepted collective term for the original inhabitants/'owners'/'stewards' of internally colonized countries (and their descendants) owing to its frequent usage by both Indigenous and non-indigenous representatives in diverse domestic as well as international forums. Although other collective terms might be considered to be more appropriate by certain individuals/groups/institutions/etc. and/or in specific contexts, such terms can present serious problems when applied generically and/or unselfconsciously.

For example, in Canada the term 'Aboriginal Peoples' is arguably the most widely accepted collective term for the original inhabitants/'owners'/'stewards' of Canada (and their descendants) owing to its use by Indigenous people and non-indigenous governments in the constitutional negotiations leading up to the *Constitution Act, 1982*. In Australia, however, this term refers only to the Indigenous Peoples of mainland Australia and Tasmania, excluding Australia's other Indigenous People -- Torres Strait Islanders. To cite another example, the term 'First Nations' is self-consciously used by many Indigenous Peoples to reinforce their status as the original political authorities of contemporary settler dominions. When used by Canadian Governments, however, this term generally applies to 'Indian Bands' (i.e. those reserve-based governance institutions constituted by the terms of the *Indian Act*) only.

In this study, the term 'Indigenous Peoples' is used as a generic collective term designating the original inhabitants/'owners'/'stewards' (and their descendants) of internally colonized countries. Original terminology remains in quotations, and other more specific terminology is used where required and/or where appropriate.

When the term 'Indigenous' is used as a proper adjective - as in 'Indigenous Peoples'; 'Indigenous people'; or, 'Indigenous territories' - it will be capitalized. When it is used as a non-proper (i.e. ordinary) adjective - as in 'indigenous rights' - it will not be capitalized. This same grammatical logic will also be applied to terms such as 'Aboriginal/aboriginal' and 'People(s)/people(s)'.

INDIGENOUS CLAIMANT GROUP:

In both Canada and Australia, Indigenous land claimants or, more specifically, native title claimants (i.e. those individuals and/or groups claiming continuing native title or continuing native title rights and interest in respect of their traditional territories) are generally referred to as 'indigenous/aboriginal claimant groups', 'indigenous/aboriginal communities' and/or 'indigenous/aboriginal societies'. In Canada, the use of this terminology arguably pays credence to the fact that the collections of persons asserting claims of continuing native title may, in fact, represent subsets of more encompassing socio-political bodies (i.e. 'Peoples' in the international law sense of the term). In Australia, by contrast, the use of this terminology arguably underscores the contemporary opinion of most (if not all) Australian governments that Indigenous Peoples do not have a right of self-determination/self-government.

Without discounting the fact that many Indigenous people object to the terminology 'indigenous claimant *group*' (emphasis added), its use has been difficult to avoid in this study owing to its prominence in the government policies under study (i.e. Canada's comprehensive claims policy and Australia's *Native Title Act*). In sum, to replace this terminology with what some might deem to be more appropriate terminology risks imposing inaccurate philosophical and/or socio-political underpinnings on the policies under study. As a result, the generic terminology of 'Indigenous land claimant(s)' and 'native title claimant(s)' has been used in this study where appropriate and the more specific terminology of 'indigenous/aboriginal group(s)', 'indigenous/aboriginal community(ies)' and 'indigenous/aboriginal societies' has been used where necessary.

COLONIAL/(POST-)COLONIAL LEGAL AND POLITICAL INSTITUTIONS:

The term 'colonial legal and political institutions' is used throughout this study to refer to the non-indigenous institutions imported by colonial newcomers to Canada and Australia. In order to distinguish contemporary colonial institutions from historic colonial institutions, a bracketed 'post' has been placed in front of the word colonial in appropriate circumstances. The bracketing of this word by the author is intended to emphasise the fact that Indigenous people continue to be the subject of colonial-minded policies, actions and attitudes in the contemporary period.

Although (post-)colonial institutions are sometimes referred to as 'existing' and/or 'dominant' legal and political institutions, it is the author's opinion that the term 'existing' ignores the continuing existence and functioning of Indigenous legal and political institutions, and the term 'dominant' ignores Indigenous people's continuing struggles against colonial subjugation. As a result, this terminology has been avoided where possible.

'TRADITIONAL':

The term 'traditional', as it is employed by the author throughout this study, should be understood as synonymous with such terms as 'pre-existing', 'original' and 'ancestral'. Used to describe such things as 'Indigenous territories', 'Indigenous laws and customs' and 'Indigenous practices', it is intended to emphasise both the pre-colonial/Indigenous origins of such things as well as their enduring relevance. In sum, the term 'traditional' (as it is used by the author) is not intended to be equated with such terms as 'pre-colonial', 'historic', and/or 'ancient' which are all generally understood as descriptors which discount the contemporary and/or continuing relevance of those things which they describe.

INTRODUCTION

The rights and interests of Indigenous Peoples in respect of their traditional territories are generally articulated as *land rights* and *native title*, two distinct yet often confounded concepts. Land rights refer to so-called ‘ordinary’ common law real property rights¹ (for example: ‘title in fee simple’, ‘freehold tenure’, ‘leasehold tenure’ and ‘usufructuary rights’) that afford their beneficiaries the right to use, enjoy, occupy and/or possess specific tracts of land. Land rights exist by virtue of deeds or grants created by the Crown and are not specific to Indigenous Peoples, meaning that they may be claimed by any individual who can prove his or her title to a specific tract of land (i.e. by producing an entitling deed or grant or by demonstrating ‘exclusive possession’² of a specific tract of land). Native title (also referred to as ‘aboriginal title’ and ‘Indian title’ in Canada, and ‘traditional title’ in Australia), by contrast, is a unique or *sui generis* common law real property right that is available only to Indigenous Peoples. Unlike ‘ordinary’ common law land rights, whose source is Crown action (i.e. the issuing of a deed or grant or confirmation of ‘exclusive possession’), native title exists by virtue of Indigenous Peoples’ occupation of their traditional territories prior to the assertion of

¹ ‘Real property’ (also termed ‘real estate’ and ‘immovable property’) is any property that is immovable (i.e. property consisting of: land; buildings, crops or other resources still attached to or within the land; and improvements or fixtures permanently attached to the land or permanently attached to a structure on the land); and/or, an interest, benefit, right or privilege in such property.

sovereignty by the Crown and/or by virtue of Indigenous Peoples' 'traditional' laws and customs. In sum, land rights are Crown-delegated rights to land and native title is a pre-existing or inherent right to land.

In the settler dominions of Canada and Australia, Indigenous Peoples have made both 'land rights' and 'native title' claims in attempts to reconcile the past dispossession of their traditional territories and to prevent future dispossession. The pursuit of native title, however, has generally been preferred to the pursuit of land rights or 'ordinary' common law title for at least two compelling reasons:

1. few Indigenous Peoples can establish 'ordinary' common law title to their traditional territories by producing a Crown issued deed or grant to the lands in question because:
 - (i) Crown deeds and grants did not exist prior to the assertion of sovereignty by the Crown; and,
 - (ii) Crown deeds and grants were infrequently issued to Indigenous people after the assertion of sovereignty by the Crown;

and,

2. few Indigenous Peoples can establish 'ordinary' common law title to their traditional territories by demonstrating their exclusive possession of said territories because:
 - (i) colonial settlement occasioned massive encroachments onto the traditional territories of Indigenous Peoples; and,
 - (ii) many Indigenous Peoples were forcibly removed from their traditional territories by government policy and/or legislation.

Securing native title to their traditional territories has also been generally preferred to securing 'ordinary' common law title to those same lands by Indigenous Peoples because native title recognises Indigenous Peoples' unique relationships with their traditional territories prior to the arrival of colonial newcomers and the subsequent assertions of

² 'Exclusive possession' is a legally defensible claim to proprietary tenure at common law in the absence of a better claim to the land(s) in question.

Crown sovereignty.³ As a result, the pursuit of native title recognition and respect is considered an important aspect of the indigenous rights agenda in both Canada and Australia.

In recent years, the Indigenous Peoples of Canada and Australia have managed to successfully navigate the judicial processes imported by their colonizers to secure native title's recognition as an existing (albeit unique) common law real property right.⁴ Securing this formal recognition (which was achieved in 1973 in the Canadian case, and 1992 in the Australian case) was not an insignificant accomplishment. Prior to the recognition of native title at common law, the claimed rights and interests of Indigenous Peoples in respect of their traditional territories were presumed to be unsubstantiated in law and thus difficult (if not impossible) to successfully assert and/or defend. As a result, political authorities could, and in fact did, justify their inaction on the Indigenous land agenda by dismissing the land-based rights claims of Indigenous Peoples as moot claims premised upon irrelevant pre-colonial histories.

Upon native title's recognition at common law, however, such justifications and inaction became not only inappropriate but also amenable to judicial review (i.e. through the litigated settlement of continuing native title claims). As a result, the recognition of native title at common law compelled an almost immediate political recognition of native

³ Although the purchase of 'ordinary' common law title is sometimes an option available to Indigenous people/Indigenous Peoples (finances permitting), many (if not most) Indigenous people view this option as an unjustified affront to their rightful ownership claims and consequently reject it on principle.

⁴ For the Canadian case see: *Calder v Attorney-General of British Columbia* [1973] SCR 313 (confirmed in *R v Guerin* [1985] 1 CNLR 120; *Roberts v Canada* [1989] 1 SCR 322; *R v Sparrow* [1990] 1 SCR 1075; *Delgamuukw v British Columbia* [1998] 3 SCR 1010; and others). For the Australian case see: *Mabo v Queensland (No. 2)* [1992] 66 ALJR 408 (confirmed in *Western Australia The Commonwealth* [1995] 128 ALR 1; *Wik and Thayorre Peoples v State of Queensland* [1996] 141 ALR 129; *Commonwealth v Yarmirr* [1999] 168 ALR 426; *Western Australia and Ors v Ward and Ors* [2000] 179 ALR 159; *Members of the Yorta Yorta Community v State of Victoria* [2001] FCA 45; and others).

title in Canada and Australia and the introduction of central government policies (i.e. the comprehensive claims policy in the Canadian case and the *Native Title Act* in the Australian case) designed to facilitate the resolution of continuing native title claims outside of ordinary judicial processes.

Given these developments, it is perhaps not surprising that much of the popular and academic commentary on the recognition of native title at common law in Canada and Australia has portrayed the act of recognition as an important, if not monumental, accommodation of indigenous rights to land. According to this body of literature, Indigenous Peoples' contemporary ability to assert and defend claims of continuing native title at common law and through central government policies rightly marks the recognition of native title at common law as a significant turning point in the legal and political accommodation of indigenous rights to land.⁵

At the same time, however, many Indigenous people and increasing numbers of Indigenous Studies scholars have criticised (post-)colonial legal and political institutions' handling of the native title issue. According to this body of literature, the judicial characterization of native title at common law and the native title claims processes designed by (post-)colonial governments have so limited the concept of 'continuing native title' that Indigenous Peoples' practical ability to successfully procure formal legal

⁵ See for example: Michael Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996" in *Indigenous Rights in Australia, Canada and New Zealand*, Paul Havemann (ed), (Auckland: Oxford University Press, 1999); C. Radha Jhappan, "Natural Right vs Legal Positivism: Indians, the Courts and the New Discourse on Aboriginal Rights in Canada", *British Journal of Canadian Studies* 6:1, (1991), pp. 60-100; Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talon, 1998); Lorna Lippman, "The Mabo Decision" in *Generations of Resistance* (3rd ed; Melbourne: Longman, 1994), ch 10; Frank Brennan, "Reconciliation in the post-Mabo era", *Aboriginal Law Bulletin* 3:61(1993), pp. 18-21; Gordon Brysland, "Rewriting History", *Alternative Law Journal* 17:4 (1992); and, Richard H. Bartlett, "The Landmark Case on Aboriginal Title in Australia: *Mabo v. State of Queensland*" in

and/or political confirmation of their unique territorial rights is little different in Canada and Australia today than it was prior to native title's recognition at common law.⁶

These counterpoised bodies of literature invite a deeper exploration of the native title issue; one that goes beyond simplistic evaluations of the relative merits and demerits of native title recognition versus non-recognition and draws attention to the manner in which native title has been practically accommodated by colonial and (post-)colonial legal and political institutions. This study takes up this invitation by offering a critical comparative analysis of the legal and political accommodation of native title in Canada and Australia using the neo-institutional lens of path dependence as an explanatory analytic framework.

I – METHODOLOGY

The decision to compare native title's legal and political accommodation in Canada and Australia was grounded in five points of commonality: (i) both countries are settler dominions of the Anglo-Commonwealth; (ii) both countries have Indigenous Peoples who have pro-actively chosen to pursue the recognition and confirmation of their unique territorial rights (i.e. native title) through the legal and political institutions of

The Recognition of Aboriginal Rights: Case Studies 1, 1996, Corrigan and Sawchuk (eds), (Brandon: Bearpaw Publishing, 1996).

⁶ See for example: Union of BC Indian Chiefs, "Certainty: Canada's Struggle to Extinguish Aboriginal Title", (Vancouver: Union of BC Indian Chiefs, 1998); Antonia Mills, *Eagle Down is Our Law: Witsuit'en Law, Feasts, and Land Claims* (Vancouver: UBC Press, 1994); Brian Thom, "Aboriginal Rights and Title in Canada After *Delgamuukw*: Anthropological Perspectives on Rights, Tests, Infringement and Justification", *Native Studies Review* 14:2 (2001), pp. 1-42; Aboriginal Provisional Government, "The Mabo Case: The Court Gives an Inch but Takes another Mile", *APG Papers* 1 (July 1992), pp. 33-44; Rob Riley, "Reconciliation", *Good Weekend*, Aug 21 (1993), p. 24; Peter Poynton, "Mabo: now you see it now you don't", *Race and Class* 35:4 (1994), pp. 41-56; Mick Dodson, "The Struggle for Recognition of Collective Rights" (1997 - unpublished manuscript); Janice Gray, "The Mabo Case: A Radical Decision", *The Canadian Journal of Native Studies* 17:1 (1997), pp. 33-74.

their colonizers; (iii) both countries have similar legal (common law) and political (Westminster-styled federalism) systems; (iv) both countries have relatively recently confirmed native title as an existing (albeit *sui generis*) common law real property right (1973 in the case of Canada; 1992 in the case of Australia); and, (v) both countries have implemented centralized land claims policies in response to the recognition of native title at common law (i.e. the comprehensive claims policy in the Canadian case and the *Native Title Act* in the Australian case).

These similarities between the Canadian and Australian cases provided fruitful grounds for the identification of key similarities and differences in respect of five important aspects of native title accommodation over time: (i) the nature and extent of colonial authorities' recognition and respect for indigenous rights to land during the early colonial settlement period (revealed through a critical comparative overview of early interactions between Indigenous Peoples and colonial newcomers – see chapter 1); (ii) the nature and extent of native title's formal recognition in law and policy (revealed through a critical comparative analysis of native title's recognition in royal prerogative, common law, statute law, and government policy – see chapter 2); (iii) the nature and extent of native title's formal accommodation within the common law system of landholding (revealed through a critical comparative analysis of the judicial characterization of native title at common law – see chapters 3, 4 and 5); and, (iv) the nature and extent of native title's formal accommodation within the existing socio-political and socio-economic realities of (post-)colonial Canada and Australia (revealed through a critical comparative analysis of Canada's comprehensive claims policy and Australia's *Native Title Act* – see chapters 6 and 7).

II - PRELIMINARY FINDINGS AND CENTRAL HYPOTHESIS

Given the similarities of the Canadian and Australian cases, three preliminary findings of this study were particularly intriguing: (i) Canada and Australia have notably different histories of recognition and respect for indigenous rights to land during their early colonial settlement periods; (ii) the Supreme Court of Canada and the High Court of Australia have characterized the *sui generis* common law real property right identified as ‘native title’ in remarkably different ways; and, (iii) the federal Government of Canada and Commonwealth Government of Australia have responded to the (post-)colonial recognition of native title at common law in intriguingly different manners.

Drawing on the first point of difference identified in this study (i.e. Canada and Australia’s notably different histories of recognition and respect for indigenous rights to land during their early colonial settlement periods), the relationship between colonial history and institutional capacity was identified as a plausible explanation for the different degrees of legal and political accommodation afforded native title in the post-common law recognition eras of Canada and Australia. This theory led to the hypothesis that colonial legal and political institutions’ capacity to meaningfully redress the historic and ongoing dispossession of Indigenous Peoples’ traditional territories is inherently dependent upon the degree of recognition and respect these institutions afforded indigenous rights to land during the early years of colonial settlement.

III - THEORETICAL FRAMEWORK

Much of the current literature on indigenous rights assumes *a priori* that colonial history is important to (and often that colonial history negatively impacts) the contemporary recognition and accommodation of indigenous rights. Using a path dependence approach to institutional reproduction and change, however, this study proposes to explain *why* colonial history is important to the legal and political accommodation of that particular indigenous right identified as ‘native title’ (i.e. the indigenous right to land) and *how* colonial history significantly influences, if not determines, native title’s legal and political accommodation over time. To accomplish this goal, a theoretically rigorous construction of ‘path-dependence’ was extrapolated from the work of James Mahoney, Paul Pierson and Margaret Levi and subsequently applied to a critical comparative analysis of native title’s legal and political accommodation in Canada and Australia over time.

i) Path Dependence

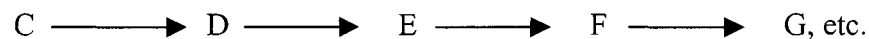
At its most theoretically vague, path dependence is defined as little more than the vague notion that ‘history matters’ or that ‘the past influences the future’.⁷ According to William Sewell, for example, path dependence means “that what happened at an earlier point in time will affect the possible outcomes of a sequence of events occurring at a later point in time.”⁸ In this definition of path dependence “previous events in a sequence influence outcomes and trajectories but not necessarily by inducing further moves in the

⁷ James Mahoney, “Path Dependence in Historical Sociology”, *Theory and Society* 29:4 (2000), p. 507.

same direction. Indeed, the path may matter precisely because it tends to provoke a reaction in some other direction.”⁹ Implicit in this broad definition of path-dependence, however, are in fact two distinct sequences of path-dependence. Mahoney classifies these as ‘reactive’ and ‘self-reinforcing’ sequences.¹⁰

Simply stated, “[r]eactive [path dependent] sequences are chains of temporally ordered and causally connected events. In a reactive sequence, each event in the sequence is both a reaction to antecedent events and a cause of subsequent events.”¹¹ According to Mahoney, “[t]hese sequences are ‘reactive’ in the sense that each event within the sequence is in part a reaction to temporally antecedent events [and in part a cause of subsequent events]. Thus, each step in the chain is ‘dependent’ on prior steps.”¹² (See Figure 1).

Figure 1 - Simplified Model of a Reactive Path Dependent Sequence



An alternative definition of path dependence, however, has been suggested by Margaret Levi. According to Levi,

[p]ath dependence has to mean, if it has to mean anything, that once a country or region has started down a tract, the costs of reversal are very high. There will be other choice points, but the entrenchments of certain

⁸ William Sewell, “Three Temporalities: Toward an Eventful Sociology” in *The Historic Turn in the Human Sciences*, Terrance J. McDonald (ed), (Ann Arbor: University of Michigan Press, 1996), pp. 262-263.

⁹ Paul Pierson, “Increasing Returns, Path Dependence, and the Study of Politics”, *American Political Science Review* 94:2 (2000), p. 252.

¹⁰ Mahoney (2000), p. 509.

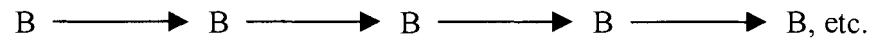
¹¹ Ibid, p. 526.

¹² Ibid, p. 509.

institutional arrangements [or policies], obstruct an easy reversal of the initial choice.¹³

In this definition of path dependence “initial steps in a particular direction induce further movement in the same direction such that over time it becomes difficult or impossible to reverse direction.”¹⁴ This can also be described as an ‘increasing returns process’. As Paul Pierson explains: “In an increasing returns process, the probability of further steps along the same path increases with each move down the path. This is because the *relative* benefits of the current activity compared with other possible options increase over time” (emphasis original).¹⁵ Mahoney describes sequences under analysis in this type of path dependence as ‘self-reinforcing sequences’. (See Figure 2).

Figure 2 - Simplified Model of a Self-Reinforcing Path Dependent Sequence



In sum, whereas ‘reactive’ path dependent sequences are marked by backlash processes that *transform* and perhaps *reverse* early events, ‘self-reinforcing’ path dependent sequences are characterised by processes of reproduction that *reinforce* early events.¹⁶

To this definition of path-dependent sequences as causal processes (either ‘reactive’ or ‘self-reinforcing’) that are highly sensitive to events that take place in the

¹³ Margaret Levi, “A Model, A Method, and a Map: Rational Choice in Comparative and Historical Analysis” in *Comparative Politics: Rationality, Culture and Structure*, ed Mark I. Lichbach and Alan S Zuckerman (Cambridge: Cambridge University Press, 1997), p. 28.

¹⁴ Mahoney (2000), p. 513.

¹⁵ Pierson (2000), p. 252.

¹⁶ Mahoney (2000), p. 526.

early stages of an overall historical sequence, Mahoney adds two additional defining features – ‘contingency’ and ‘inherent sequentiality’.

According to Mahoney, “in a path-dependent sequence, early historical events are contingent^[17] occurrences that cannot be explained on the basis of prior events or ‘initial conditions’. Since these early historical events are of decisive importance for the final outcome of the sequence, this criterion rules out the possibility of predicting a final outcome on the basis of initial conditions.”¹⁸ In other words, in a path-dependent sequence, “the causes of institutional [or policy trend] reproduction are distinct from the processes that bring about the institution [or policy] in the first place; path dependent institutions [and policy trends] persist in the absence of the forces responsible for their original production.”¹⁹

As a result, not all event chains or sequences of causally connected events are properly characterized as ‘path dependent’. As Mahoney explains:

For a reactive sequence to follow a specifically path-dependent trajectory, as opposed to representing simply a sequence of causally connected events, the historical event that sets the chain into motion must have properties of contingency. From the perspective of theory, such an event appears as a ‘breakpoint’ that could not have been anticipated or predicted.

...

The contingent initial event that triggers a reactive causal chain is often itself the intersection point of two or more prior sequences. Historical sociologists use the expression ‘conjuncture’ to refer to this coming together – or temporal intersection – of separately determined sequences. The point in time at which two independent sequences intersect will often not be predictable in advance. Likewise, the specific event generated by the intersection of the sequences may be outside of the resolving power of

¹⁷ According to Mahoney (2000), “[c]ontingency refers to the inability of theory to predict or explain, either deterministically or probabilistically, the occurrence of a specific outcome” (p. 513).

¹⁸ Ibid, p. 511.

¹⁹ Ibid, p. 515.

the prevailing theories. Hence, conjunctures are often treated as contingent occurrences. This is true even though each of the sequences that collide to make a conjuncture may themselves follow a highly predictable causal pattern.²⁰ [See Figure 3.]

Similarly, for self-reinforcing sequences to be properly characterized as ‘path-dependent’,

periods of institutional [or policy trend] genesis [must] correspond to ‘critical junctures’. Critical junctures are characterized by the adoption of a particular institutional arrangement [or policy] from among two or more alternatives. These junctures are ‘critical’ because once a particular option is selected it becomes progressively more difficult to return to the initial point when multiple alternatives were still available.²¹ [See Figure 4.]

As Paul Pierson explains:

Mathematicians call this a Polya urn process.^[22] Its characteristic qualities stem from the fact that an element of chance (or accident) is combined with a decision rule that links current probabilities to the outcomes of preceding (partly random) sequences. Polya urn processes exhibit increasing returns or positive feedback. Each step along a particular path produces consequences which make that path more attractive for the next round. As such effects begin to accumulate, they generate a powerful virtuous (or vicious) cycle of self-reinforcing activity.²³

In sum, “a system that exhibits path dependency [i.e. a ‘self-reinforcing’ or ‘reactive’ path dependent sequences] is one in which outcomes are related stochastically to initial conditions.”²⁴

²⁰ Ibid, 509.

²¹ Mahoney (2000), p. 513.

²² A Polya urn process begins with a large urn containing two balls – one black, one red. A subject is asked to remove one ball from the urn and then return it to the same urn along with an additional ball of the same colour. This selection process continues until the urn is filled with balls.

²³ Pierson (2000), p. 253.

²⁴ Mahoney (2000), p. 511 (quoting Jack Goldstone, “Initial Conditions, General Laws, Path Dependence, and Explanation in Historical Sociology” *American Journal of Sociology* 104 (1998), p. 834).

The second defining feature of path dependent sequences, according to Mahoney, is ‘inherent sequentiality’.²⁵ This means that “once contingent historical events take place, path-dependent sequences are marked by relatively deterministic causal patterns or what can be thought of as ‘inertia’ – i.e., once processes are set into motion and begin tracking a particular outcome, these processes tend to stay in motion and continue to track this outcome.”²⁶

As Mahoney explains, “[w]ith reactive sequences, ... inertia involves reaction and counterreaction mechanisms that give an event chain an ‘inherent logic’ in which one event ‘naturally’ leads to another event.”²⁷ For example, in a reactive path dependent sequence a contingent event results in the choice of option ‘C’ at Time-1, which leads to the choice of option ‘D’ at Time-2, which leads to the choice of option ‘E’ at Time-3, etc. (see Figure 3). With self-reinforcing path dependent sequences, by contrast, “inertia involves mechanisms that *reproduce* a particular institutional pattern [or policy choice]” (emphasis original).²⁸ As a result, the initial, contingent choice of option ‘B’ at Time-1 leads option ‘B’ to be preferred over alternative options at Time-2, and again at Time-3, etc. (see Figure 4).

In sum, path dependent sequences (whether reactive or self-reinforcing) have relatively inflexible trajectories; “[t]he farther into the process we are, the harder it becomes to shift from one path to another ... Sufficient movement down a particular path may eventually lock in [an institutional arrangement or policy choice].”²⁹

²⁵ Mahoney (2000), p. 509.

²⁶ Ibid, p. 511.

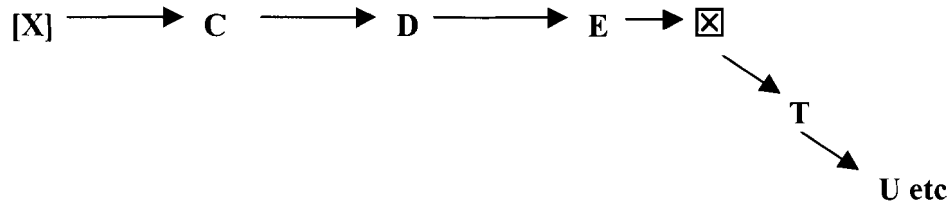
²⁷ Ibid.

²⁸ Ibid.

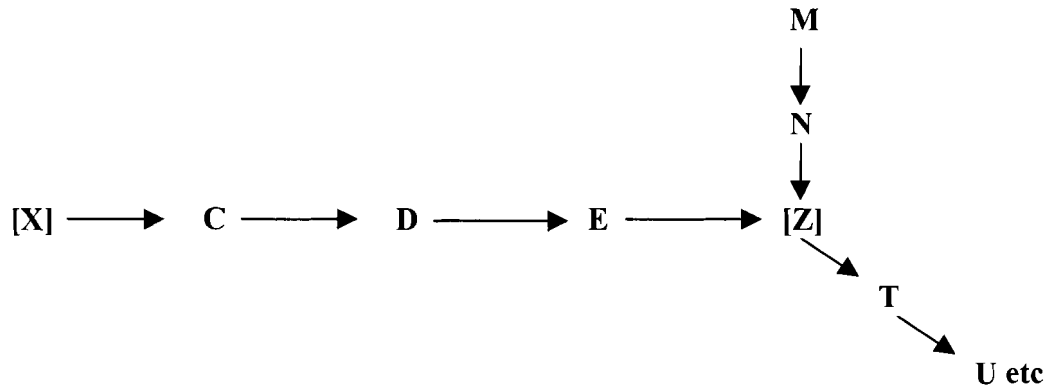
²⁹ Pierson (2000), p. 253.

Figure 3 - Genesis, Reproduction and Change in Reactive Path-Dependent Sequences³⁰

Seq. 1: A Key Break Point in History Initiates A New 'Reactive' Path Dependent Sequence



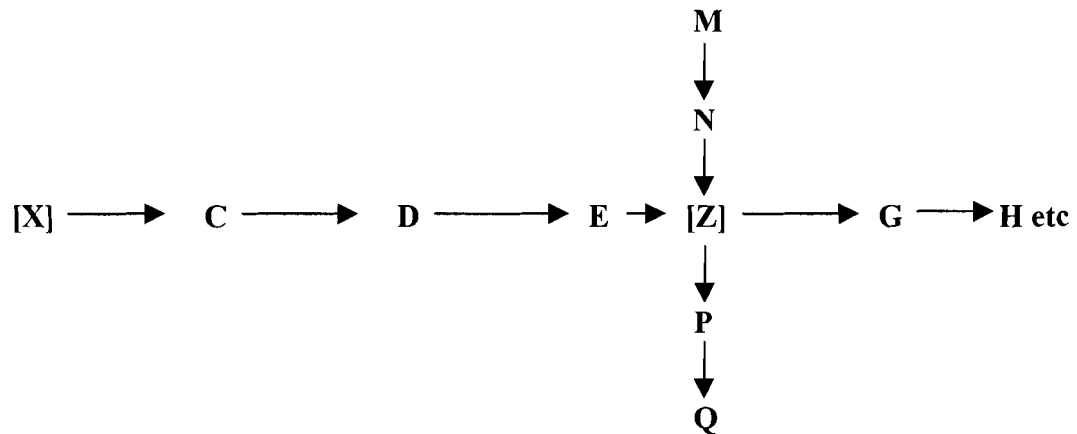
Seq. 2 - A Critical Juncture Initiates A New 'Reactive' Path Dependent Sequence



Seq. 3: A Key Breakpoint in History Temporarily Disrupts (but ultimately does not alter) the Existing Path Trajectory



Seq. 4: A Critical Juncture Temporarily Disrupts (but ultimately does not alter) the Existing Path Trajectory



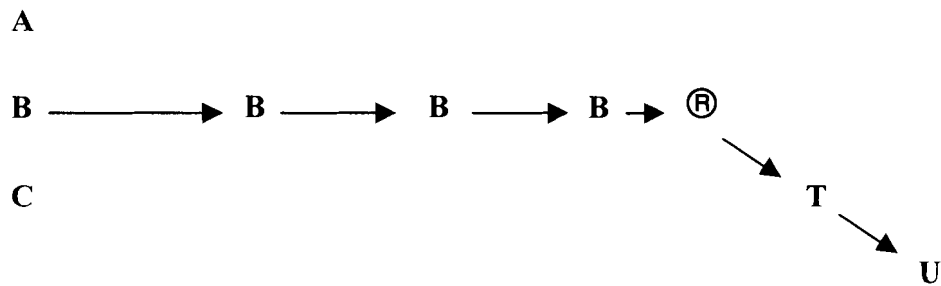
³⁰ Adapted from: Mahoney (2000), 'Figure 1: Illustration of contingency in self-reinforcing path dependent sequences', p. 514; and, 'Figure 2: Examples of sequences and conjunctures', p. 529.

Figure 3 (cont.)

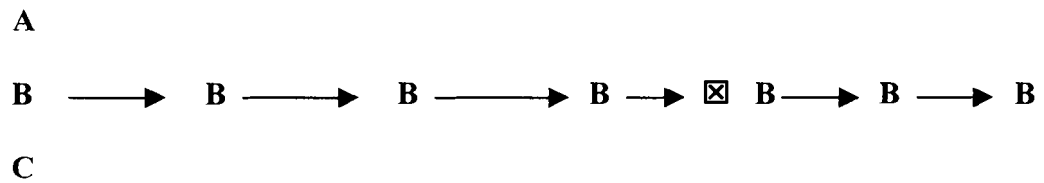
Time 1 Initial Contingent Period	Time 2+ Reactive Path Dependent Sequence	Time 3 Conjuncture (2 nd Contingent Period)	Time 4 Consequence of Conjuncture
<p>A contingent event ('{X}') provokes the adoption of a particular institutional arrangement or policy choice ('C').</p> <p>Although 'X' could not have been anticipated or predicted (i.e. 'X' is a contingent event), theory may be able to explain why 'X' provoked the adoption of 'C'.</p>	<p>The adoption of 'C' at Time-1 initiates a 'reactive' path dependent sequence ('D', 'E') in which each subsequent choice is both a reaction to previous choices and a cause of later choices.</p>	<p>A 'key breakpoint in history' ('⊗' in seq. 1 and seq. 3) or 'critical juncture' ('{Z}' in seq. 2 and seq. 4) intersects the existing reactive path dependent sequence.</p> <p>This key breakpoint in history ('⊗') or critical juncture ('{Z}') is a contingent event that was not anticipated or predicted by theory.</p>	<p><u>Seq. 1 and 2 – Conjunctures with Enduring Consequences</u></p> <p>The key breakpoint in history/critical juncture in question disrupts the existing reactive path dependent sequence and initiates a new reactive path dependent sequence ('T', 'U', etc.).</p> <p>This new 'reactive' path dependent sequence holds the potential to become 'self-reinforcing' (i.e. 'T', 'U', 'U', 'U', 'U', etc.).</p> <p><u>Seq. 3 and 4 – Conjunctures with No Enduring Consequences</u></p> <p>The key breakpoint in history/critical juncture in question temporarily disrupts the existing path dependent sequence but has no enduring consequences (i.e. the existing reactive path dependent sequence - 'G', 'H' etc. – resumes).</p>

Figure 4 – Genesis, Reproduction and Change in Self-Reinforcing Path Dependent Sequences³¹

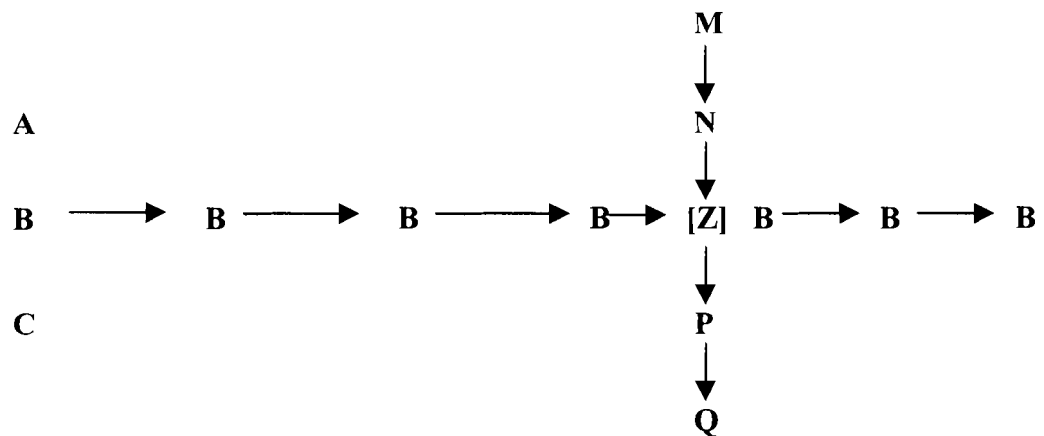
Seq. 1: A Rupture in the Mechanism of Institutional/Policy Trend Reproduction Initiates A New ‘Reactive’ Path Dependent Sequence



Seq. 2: A Key Break Point in History Disrupts (but ultimately does not alter) the Existing Path Dependent Sequence



Seq. 2: A Critical Juncture Disrupts (but ultimately does not alter) the Existing Path Dependent Sequence



³¹ Adapted from: Mahoney (2000), 'Figure 1. Illustration of contingency in self-reinforcing sequences', p. 514.

Figure 4 (cont.)

Time 1 Initial Conditions	Time 2 Contingent Period	Time 3+ Self-Reinforcement	Time 4 Rupture in Mechanism of Reproduction or Conjunctures
<p>Multiple options ('A', 'B', 'C') are available for selection.</p> <p>Theory is unable to predict or explain the option that will be adopted.</p>	<p>Option 'B' is initially favored over competing options.</p> <p>This is a contingent event.</p>	<p>Option 'B' capitalizes on initial advantage and is stably reproduced over time ('B', 'B', 'B').</p>	<p><u>Seq. 1</u></p> <p>One of the following 'ruptures in the mechanism of reproduction' ('⊗'), predicted by theory, provokes a new 'reactive' path trajectory:</p> <ul style="list-style-type: none"> (i) increased competitive pressures or learning process (utilitarian explanation); (ii) exogenous shock(s) that transforms system needs (functional explanation); (iii) weakening of elites and strengthening of subordinate groups (power explanation); (iv) change(s) in dominant ideas and attitudes or subjective orientations and beliefs (cultural/deontological explanation); (v) change(s) in rules, norms, and/or practices (structural explanation); (vi) change(s) in structural and cultural conditionings (morphogenetic explanation). <p>Such ruptures may be initiated by a 'key breakpoint in history' or by a 'critical juncture'.</p> <p>The new 'reactive' path dependent sequence has the potential to become 'self-reinforcing' (i.e. 'T', 'U', 'U' etc.)</p> <p><u>Seq. 2 and Seq. 3</u></p> <p>A key break point in history ('⊗' in seq. 2) or critical juncture ('[Z]' in seq. 3) temporarily disrupts, but ultimately does not alter, the existing path trajectory (i.e. the existing self-reinforcing path dependent sequence resumes - 'B', 'B', 'B', etc.).</p>

For the purposes of this study, then, “path dependence characterizes specifically those historical sequences in which contingent events set into motion institutional patterns or event chains that have [relatively] deterministic properties.”³² As Mahoney explains:

In the case of a self-reinforcing [path dependent] sequence, the contingent period corresponds with the initial adoption of a particular institutional arrangement [or policy], while the deterministic pattern corresponds with the stable reproduction of this institution [or policy] over time. By contrast, in the case of a reactive [path dependent] sequence, the contingent period corresponds with a key breakpoint in history, while the deterministic pattern corresponds with a series of reactions that logically follow from this break point.³³

This construction of path dependence, however, is not bull-headed historical determinism blind to the possibility of change. As illustrated by Figures 3 and 4, specific events or conditions can alter existing path dependent sequences, but these events or conditions must be distinct from the initial events or conditions that set the path-dependent sequence in motion in the first place. As Pierson explains, “[t]he claims of path dependent arguments are that previously available options may be foreclosed in the aftermath of a sustained period of positive feedback, and cumulative commitments on the existing path with often make change difficult and will condition the form in which new branchings will occur.”³⁴

In ‘reactive’ path dependent sequences, for example, change is traced to either ‘key breakpoints in history’ or ‘critical junctures’ in pre-established chains of temporally

³² Mahoney (2000), p. 507.

³³ Ibid, p. 535.

³⁴ Pierson (2000), p. 265.

ordered and causally connected events.³⁵ In this type of path-dependent sequence, change may result from either the contingent temporal intersection of an unanticipated event and an existing event chain (see Figure 3, seq. 1) or the unpredicted conjuncture of two separately determined event chains (see Figure 3, seq. 2). In ‘self-reinforcing’ path dependent sequences, by contrast, change is traced to ‘ruptures’ in the mechanisms of institutional reproduction. In this type of path-dependent sequence, change results when conditions not present or options not available at the start of the path-dependent sequence emerge and force a reconsideration of the existing institutional arrangement or policy trend (relative to alternative institutional arrangements or policy choices). Because there are different theories of institutional reproduction, there are different theories of institutional change in ‘self-reinforcing sequences. Each theory suggests a different mechanism of institutional reproduction and thus each theory also suggests a different mechanism for institutional change (see Figure 4).³⁶

In sum, systems that exhibit path dependent are not inherently static (although they may exhibit stasis over a relatively long period of time). As Douglas North explains: “At every step along the way there [are choice points] ... that provide ... [decision makers with] real alternatives. Path dependence is a way to narrow conceptually the choice set and link decision making through time. It is not a story of inevitability in which the past neatly predicts the future.”³⁷

³⁵ See: Mahoney (2000), ‘*Figure 2: Examples of sequences and conjunctures*’ p. 529 and ‘*Figure 3: Goldstone’s reactive sequence explanation of English industrialization*’, p. 534.

³⁶ These theories and their mechanisms of institutional reproduction and change are discussed at greater length in this study’s Conclusion.

³⁷ Douglas North, *Institutions, Institutional Change and Economic Performance* (Cambridge: Cambridge University Press, 1990), pp. 98-99, as quoted in Pierson (2000), p. 265.

ii) Path Dependence and the Recognition of Native Title at Common Law

As explained above, much of the popular and academic commentary on the recognition of native title at common law in Canada and Australia has portrayed the act of recognition as an important, if not monumental, accommodation of indigenous rights to land. Implicit in these commentaries is the identification of native title's common law recognition as a 'key breakpoint in history' from which a 'reactive' path dependent sequence (characterized by the political recognition and accommodation of native title) followed. Implicit in the counter-commentaries put forth by Indigenous people and increasing numbers of Indigenous Studies scholars, however, is the identification of native title's common law recognition and subsequent political recognition and accommodation as little more than successive events in a 'self-reinforcing path dependent sequence' that finds its origin in the initial and historically contingent recognition and accommodation of indigenous rights to land (i.e. the degree of [non-]recognition and [non-]respect provided to indigenous rights to land during the early years of colonial settlement). In sum, this body of literature perceives the recognition of native title at common law as a contingent conjunctural event that temporarily disrupted (but ultimately did not significantly alter) the pre-existing legal and political accommodation of indigenous rights to land.

As this study will argue this latter interpretation of events holds considerably more explanatory power than does the first.

IV - CENTRAL ARGUMENT

Characterizing native title's legal and political accommodation as a 'self-reinforcing path dependent sequence' (which is characterised by processes of reproduction that *reinforce* early events), this study will argue that the different degrees of recognition and accommodation afforded native title by the legal and political institutions of (post-)colonial Canada and Australia can be meaningfully explained with reference to these countries' different (and historically contingent) recognition and accommodation of indigenous rights to land during their earliest years of colonial settlement. In sum, this study will argue that Canada's initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land 'owners' and Australia's initial and historically contingent recognition of Indigenous Peoples as mere land 'inhabitants' and/or land 'users' initiated case-specific accommodations of indigenous rights to land that were temporarily disrupted (but ultimately not significantly altered) by the recognition of native title at common law (and other legal and political events).³⁸

This interpretation of events not only provides a meaningful explanation for colonial history's continuing role in the legal and political accommodation of native title in the Canadian and Australian cases, it also provides a meaningful explanation for this study's four central findings: (i) the legal and political recognition of native title is relatively more extensive and secure in the Canadian case than it is in the Australian case;

³⁸ Although it may be possible to argue that the recognition of native title at common law significantly altered the existing legal and political accommodation of 'indigenous rights' generally speaking (particularly in the Canadian case), the focus of this study is the legal and political accommodation of that particular 'indigenous right' identified as 'native title' (i.e. the 'indigenous right' to land). The distinction between 'indigenous rights' and 'native title' is discussed in some detail in chapters 3 and 4.

(ii) the judicial construction of native title at common law has produced a relatively stronger real property right in the Canadian case than it has in the Australian case; (iii) Canada's comprehensive claims policy has given Indigenous Peoples a relatively stronger ability to assert and defend claims of continuing native title than has Australia's *Native Title Act*; and, (iv) the ability of Indigenous Peoples to procure formal confirmation of their unique territorial rights (i.e. continuing native title) is little different in Canada and Australia today than it was prior to the recognition of native title at common law and the subsequent recognition of native title in central government policy.³⁹

V – OVERVIEW

The purpose of this study is to offer a rich account of the legal and political accommodation of native title in the settler dominions of Canada and Australia over time using neo-institutional lens of path dependence as an explanatory analytic framework. Because the construction of path dependence that was developed for the purposes of this study requires a clear preliminary identification of the initial and historically contingent event(s) that set any (presumed) path dependent sequence in motion, Chapter 1 begins this study with a focused overview of the early colonial histories of Canada and Australia and their impact upon Indigenous Peoples' rights in respect of their traditional territories. Drawing particular attention to the unique conditions that governed early relations

³⁹ In making this claim I do not discount the important land related benefits that have accrued to some Indigenous Peoples as a result of contemporary land claims settlements (particularly in the Canadian case). My claim, rather, is that the recognition of native title at common law and in central government policy has not significantly advanced the actual confirmation of a particular type of property right (that being 'continuing native title') in respect of particular tracts of land.

between colonial newcomers and Indigenous Peoples in Canada and Australia, this chapter argues that the numerous reasons colonial newcomers and Indigenous Peoples had for strategically interacting during the early years of colonial settlement in the Canadian case led colonial authorities to treat Indigenous Peoples as potential (if not actual) land ‘owners’, while the decided lack of reasons for strategic interaction between colonial newcomers and Indigenous Peoples during the early years of colonial settlement in the Australian case led colonial authorities to treat Indigenous Peoples as mere land ‘inhabitants’ and/or land ‘users’.

Building on these findings, Chapter 2 moves on to discuss the developments leading up to and including the formal recognition of ‘native title’ at common law, in statute law and in central government policy. It is in this rather lengthy chapter that Canada's initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners is demonstrated to have facilitated native title’s formal recognition in law and policy to a considerably greater extent than has Australia’s initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants or land users. Setting in place the first substantial cornerstone of the self-reinforcing path dependent sequence thesis, this chapter argues that the formal recognition of native title in law and policy in both the Canadian and Australian cases is largely consistent with (rather than fundamentally at odds with) the initial and historically contingent accommodation of indigenous rights to land.

The general context of native title’s legal and political recognition having been established, the body of this study then moves on to provide a detailed comparative analysis of native title’s formal accommodation at common law and in central

government policy. Beginning with the formal accommodation of native title at common law, Chapters 3 to 5 draw on the most comprehensive native title decisions to date in order to identify, compare and critically analyze native title's source, nature and content (Chapter 3), native title's vulnerability to lawful extinguishment (Chapter 4), and native title's proof criteria (Chapter 5) as these have been characterized by the Supreme Court of Canada and High Court of Australia respectively. Providing additional convincing support to the self-reinforcing path dependent sequence thesis, the overarching finding of these three successive chapters is that the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners in the Canadian case and as mere land inhabitants and/or land users in the Australian case has critically informed the formal judicial accommodation of native title within the hierarchy of 'ordinary' common law land holdings in the Canadian and Australian cases respectively. These chapters also demonstrate that the formal judicial accommodation of native title has placed significant limits on Indigenous Peoples' practical ability to successfully procure formal judicial confirmation of 'continuing native title' in the post-common law recognition era.

These findings are subsequently reinforced in chapters 6 and 7, which focus attention on the nature, goals and assumptions (Chapter 6) and practical limitations (Chapter 7) of Canada's comprehensive claims policy and Australia's *Native Title Act* (the two central government policies that were introduced in the immediate aftermath of native title's formal recognition at common law). In sum, by teasing out Indigenous Peoples' practical ability to assert and defend claims of continuing native title outside of ordinary judicial processes, these two chapters pointedly reveal how the initial and historically contingent accommodation of indigenous rights to land, the formal

accommodation of native title at common law, and the formal accommodation of native title in central government policy have interacted in a mutually reinforcing way to significantly limit Indigenous Peoples' practical ability to successfully procure formal confirmation of their unique territorial rights (i.e. continuing native title) in the post-common law recognition era.

This study concludes with an overview of major findings, a synopsis of the central argument, and a forward-looking discussion of the future of native title accommodation in Canada and Australia. Although this study's central finding is that neither the recognition of native title at common law nor the legal and political developments that this event precipitated have significantly improved Indigenous Peoples' practical ability secure legal and political confirmation of continuing native title, it does not argue that the self-reinforcing path dependent sequence of native title accommodation currently in evidence in Canada and Australia is definitively untransformable. As will be explained in more detail in the Conclusion, specific events and/or conditions may precipitate a new (or significantly altered) legal and/or political accommodation of native title in Canada and/or Australia in the future. Determining which events and/or conditions are likely to result in such change(s), however, is no easy task.

CHAPTER 1

COLONIAL HISTORY, HISTORICAL CONTINGENCY AND INDIGENOUS RIGHTS TO LAND

It is almost impossible to exaggerate the importance of land to Indigenous Peoples. Unlike 'western' interests in land, which are generally only economic, indigenous interests in land are spiritual, cultural, political *and* economic. For Indigenous Peoples, land is not merely personal property, but a sacred link between the past, present and future; the physical and metaphysical worlds. As anthropologist W.E. Stanner's often quoted statement succinctly emphasises,

No English words are good enough to give a sense of the links between an Aboriginal group and its homeland. Our word 'home' ... does not match the Aboriginal word that may mean 'camp', 'hearth', 'country', 'everlasting home', 'totem place', 'life source', 'spirit centre', and much else all in one ... When we took what we call 'land' we took what to them meant, hearth, home, the source and locus of life, and everlastingness of spirit.¹

For European newcomers to Indigenous territories, land was (and is) also of significant importance. During the early colonial era, Imperial expansion was first and foremost driven by the desire to secure access to valuable resources and arable lands.

Securing access required not only discovering new lands with plentiful supplies of valuable resources and/or significant agricultural potential but also acquiring dominion over these lands in order to ensure exclusive access. As a result, the traditional territories of Indigenous Peoples were claimed in the names of various earthly and heavenly rulers and the prosperous settler dominions of Canada and Australia came to be established in the wake.

Contrary to colonial mythology, however, when colonial newcomers arrived and 'settled' in present-day Canada and Australia, Indigenous Peoples did not voluntarily surrender their traditional territories, nor were these ceded to the colonists by conquest. Instead, Indigenous Peoples asserted (and continue to assert) their dominion over their traditional territories and all of the rights and benefits thereby entitled to them. Unfortunately for Indigenous Peoples, however, these assertions were largely (some would argue entirely) disregarded as Imperial and colonial authorities called upon a range of social theories, legal fallacies, historical fictions and popular 'common sense' to justify the appropriation of traditional Indigenous territories.

As this chapter will demonstrate, however, the degree of recognition and respect provided to Indigenous Peoples' pre-existing rights in respect of their traditional territories during the earliest years of colonial settlement is notably more extensive in the Canadian case than it is in the Australian case. This, it is argued, is owing to the different historically contingent conditions that governed colonial newcomers' earliest interactions with Indigenous Peoples in the Canadian and Australian cases respectively.

¹ W. E. Stanner, "After the Dreaming: Black and White Australians, An Anthropologist's View", Boyer Lectures 1968, (Sydney: Australian Broadcasting Commission, 1968) as quoted in Lorna Lippman, *Generations of Resistance: The Struggle for Justice* (Melbourne: Longman Cheshire, 1981), p. 46.

I – THE RECOGNITION OF INDIGENOUS RIGHTS TO LAND DURING CANADA’S EARLY COLONIAL SETTLEMENT PERIOD

During the earliest years of colonial settlement in Canada, the issue of who ‘owned’ the land was not a major concern. Predominantly interested in prospering from the fur trade, the early colonial newcomers to present-day Canada actively solicited the assistance, skills and knowledge of Indigenous Peoples in order to do so. The two dominant groups of colonial newcomers – the English and the French – also solicited the friendship and military allegiance of Indigenous Peoples in order to facilitate their respective nations’ dominance over the resource-rich North American continent. Inspired by their own strategic interests (which included obtaining useful European tools, materials, food stocks and medicines and augmenting their military strength in the face of rival Indigenous Nations) the Indigenous Peoples of Canada willingly shared their knowledge and skills with colonial newcomers and actively solicited their friendship and allegiance as well.²

To secure continuation of these mutually beneficial relationships, Indigenous Peoples and colonial newcomers concluded a disparate series of so-called ‘peace and friendship’ treaties between the years 1701 and 1779 (see Figure 5 below). These earliest Canadian treaties, which predominate in the maritime regions of Canada, generally did not include provisions for the purchase or surrender of traditional Indigenous territories but instead served to solidify mutually beneficial co-operative alliances.³

² For a more detailed account of early interactions between European settlers and Indigenous Peoples see: J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (3rd ed.; Toronto: University of Toronto Press, 2000), ch. 1-4.

³ See for example: *R v. Simon* [1985] 2 SCR 387.

i) The Nature and Intent of the 'Peace and Friendship' Treaties

The European concept of treaties – formal, binding agreements between independent nations – was not new to the Indigenous Peoples of Canada. In fact, many Indigenous Peoples used treaties before the arrival of colonial newcomers to secure international agreement on a wide range of important matters (for example: establishing reciprocal trade relationships; securing military alliances; and regulating the use of hunting, fishing and trapping areas). As explained in a 2002 Assembly of First Nations paper entitled “Peace, Friendship and Respect: Understanding Indigenous Treaties in Canada”:

The first treaties in North America did not involve non-native peoples. The purposes and protocols for treaty-making could be found amongst numerous First Nations prior to the arrival of Europeans. ... These treaties, which were usually oral, would record solemn agreements about how to relate to all parts of their world. For example, The Haudenosaunee of the eastern Great Lakes maintain a sophisticated treaty tradition about how to live in peace that involves all their relations: the plants, fish, animals members of their nation and members of other nations. Other First Nations have laws reflected in agreements that similarly guide their actions in their respective place.

When non-native people arrived on the shores of this continent, First Nations laws, protocols and procedures set the framework for the first treaties between Aboriginal peoples and the Dutch, French, British and Canadian Crowns.⁴

As a result, the early peace and friendship treaty process can be described a more or less mutually understood and respected means of securing enduring cooperative alliances.

The nature and intent of these enduring cooperative alliances is symbolized by the Iroquois (*Haudenosaunee*) Confederacy's Two Row Wampum (*Gus-Wen-Tah*), a decorative belt that was used to solemnize agreements made during formal 'peace and

friendship' treaty negotiations. As Indigenous legal academic Robert A. Williams Jr. explains:

[w]hen the Haudenosaunee first came into contact with the European nations, treaties of peace and friendship were made. Each was symbolized by the Gus-Wen-Tah, or Two Row Wampum. There is a bead of white wampum which symbolizes the purity of the agreement. There are two rows of purple, and those two rows have the spirit of your ancestors and mine. There are three beads of wampum separating the two rows and they symbolize peace, friendship and respect. These two rows will symbolize two paths or two vessels, travelling down the same river together. One, a birch bark canoe, will be for the Indian people, their laws, their customs and their ways. The other, a ship, will be for the white people and their laws, their customs and their ways. We shall each travel the river together, side by side, but in our own way. Neither of us will try to steer the other's vessel.⁵

According to contemporary Indigenous political leaders Ovide Mercredi and Mary Ellen Turpell, “[t]he two-row wampum captures the original values that governed the [Indigenous-colonial newcomer] relationship – equality, respect, dignity and a sharing of the river we travel on.”⁶

As Thomas Isaac explains, however, European newcomers embrace of these original values was more than likely strategically (rather than philosophically) motivated:

Between 1713 and 1763 much political instability existed in eastern North America. The Maritimes were central to the struggle between the French and the English over control of North America, with the Mi'kmaq and Maliseet in the middle of the conflict. From 1713, when the British acquired sovereignty over the Maritimes, until the Proclamations of 1762 and 1763, a series of peace and friendship treaties were signed between

⁴ Assembly of First Nations (with John Borrows), “Peace, Friendship and Respect: Understanding Indigenous Treaties in Canada” (Ottawa: Assembly of First Nations, 2002), p. 3.

⁵ Robert A. Williams, Jr., “The Algebra of Federal Indian Law: The Hard Trail of Decolonizing and Americanizing the White Man's Indian Jurisprudence” (1986) *Wisconsin Law Review* 219 at 219 as quoted in John Burrows, ‘Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government’, in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch (ed), (Vancouver: UBC Press, 1997), p. 164.

⁶ Ovide Mercredi and Mary Ellen Turpel, *In the Rapids: Navigating the Future of First Nations* (Toronto: Viking Press, 1993), p. 35.

the British and the Mi'kmaq⁷ and Maliseet peoples in what is now New Brunswick and Nova Scotia. The primary goal of these treaties was to solidify peaceful relations with the Mi'kmaq and Maliseet and to end hostilities between them and the British. In return for agreeing to keep the peace and respect British law, the Crown promised the Mi'kmaq and Maliseet rights to hunt, fish and trade. Unlike other treaties in Canada, these treaties did not involve the cession of land and did not expressly extinguish Aboriginal title^{8,9}.

After the defeat of the French and with increasing European settlement, however, European treaty priorities shifted from securing the friendship and allegiance of Indigenous Peoples to securing lawful title to their traditional territories. To facilitate this change in European priorities Canada's first indigenous land claims policy was instituted. This policy was outlined in the *Royal Proclamation of 1763*, a royal prerogative issued by King George III of Britain on 7 October 1763.

ii) The Royal Proclamation of 1763

The ostensible purpose of the *Royal Proclamation of 1763* was to establish British sovereignty throughout the British territories of North America following the Seven Years War and the signing of the *Treaty of Paris*.¹⁰ In addition to creating four new British territories (Quebec, East Florida, West Florida and Grenada) and establishing a government in each, however, the *Royal Proclamation of 1763* also endeavoured to

⁷ See: W. Wicken, "The Mi'kmaq and Wuastukwiuk Treaties" (1994) 44 UNBLJ 241.

⁸ P.A. Cumming and N.H. Mickenberg, *Native Rights in Canada* (2nd ed; Toronto: General Publishing Ltd., 1972), p. 98.

⁹ Thomas Isaac, 'Early Maritime Peace and Friendship Treaties' in *Aboriginal Law: Commentary, Cases and Materials* (3rd ed; Saskatoon: Purich, 2004), pp. 72-73. See also: Thomas Isaac, *Aboriginal and Treaty Rights in the Maritimes: The Marshall Decision and Beyond* (Saskatoon: Purich Publishing, 2001); and, *R. v. Simon*, *supra* note 3.

¹⁰ The capture of Quebec in 1759, and the capitulation of Montreal in 1760, were followed in 1763 by the cession to Great Britain of Canada and all its dependencies. Through this act of cession, Great Britain

facilitate the peaceful colonial settlement of British North America by establishing a formal policy for colonial land acquisition dealings with Indigenous Peoples.

Through the terms of this policy, the British Crown not only acknowledged the pre-existing rights of Indigenous Peoples in respect of their traditional territories but also confirmed its intentions to respect those rights in the wake of British sovereignty. It did so by: (i) reserving all lands not ceded to or purchased by the Crown to the 'Indians' as 'their Hunting Grounds'; (ii) ordering all British subjects settled on unceded Indigenous territories to remove themselves from these lands immediately; (iii) prohibiting colonial authorities from granting 'Warrants of Survey' (i.e. allowing new settlement lands to be staked-out) or passing 'Patents from Land' (i.e. issuing land title to settlers) in the absence of specific instruction from the Crown; (iv) prohibiting all private land dealings with Indigenous Peoples; and, (v) ordering all Crown sanctioned land purchases and acquisitions to be preceded by a public meeting of the Indigenous People(s) concerned and express Indigenous consent (please see Appendix 1 for a relevant excerpt from the *Royal Proclamation of 1763*).¹¹

It is these terms of the *Royal Proclamation of 1763* that compelled colonial authorities (and later, the Dominion Government of Canada) to enter into formal 'land surrender' treaties with Indigenous Peoples in advance of colonial settlement. As explained by the (former) federal Office of Native Claims:

In the British colonies [of North America] British policy ... required that British subjects recognize the interests of the native people in the land and provide compensation where the taking and using of such land interfered

acquired the sovereignty, property, and possessions of the Crown of France, and all other rights that had at any previous time been held or acquired by the Crown of France, in the North American continent.

¹¹ For a more critical reading of the *Royal Proclamation* see: Menno Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993), ch. 1.

with their traditional pursuits. This gave rise, in what was to become Canada, to the practice of entering into agreements with various tribes. In these ... agreements recognition of native rights and compensation for their loss followed the same procedure as a military or commercial alliance – through a *treaty*, solemnized by the giving of presents.¹²

iii) The ‘Lettered’ and ‘Numbered’ Treaties

Instigated by the *Royal Proclamation of 1763* and purportedly negotiated according to its terms, the ‘lettered’ (pre-Confederation) and ‘numbered’ (post-Confederation) treaties were designed by colonial authorities to secure Indigenous Peoples’ ‘surrender’ of increasingly large areas of their traditional territories. In exchange, Indigenous Peoples were provided with: one-time cash payments and/or gifts; small monetary annuities; and ‘reserved’ tracts of their traditional territories. These provisions were designed by colonial authorities to secure Indigenous Peoples’ formal ‘surrender’ of their traditional territories.

Indigenous Peoples, however, interpreted these provisions very differently, in accordance with their own treaty protocols. According to Indigenous Peoples, these provisions demonstrated colonial newcomers’ respect for their inherent sovereignty (one-time cash payments and gifts), provided for the sharing of specific areas of their traditional territories with colonial newcomers (small monetary annuities), and ensured Indigenous Peoples’ continuing exclusive jurisdiction over those areas of their traditional territories that were not designated to be ‘shared’ with colonial newcomers (‘reserved’ tracts of land).

¹² Canada, Indian and Northern Affairs – Office of Native Claims, *Native Claims: Policy, Process and Perspectives*, opinion paper prepared for the Second National Workshop of the Canadian Arctic Resources Committee – Edmonton, AB, 20-22 February 1978 (Ottawa: Minister of Supply and Services Canada, 1978), p. 2.

It is also important to note that the terms of the ‘lettered’ and ‘numbered’ treaties (collectively referred to as the so-called historic ‘land surrender’ treaties) also generally included: provisions for Indigenous Peoples’ preferential access to colonial trading posts; guaranteed hunting, fishing and trapping rights in designated areas; as well as promises for the provision of such ‘treaty’ entitlements as schools, medicines, cattle, agricultural implements and ammunition.¹³ These provisions, many of which were formally requested by Indigenous parties to treaty negotiations¹⁴, were designed to ensure the continuing livelihood, economic development, and social growth of Indigenous Peoples, although these goals were very differently perceived by the parties involved.

In sum, while Indigenous parties to historic treaty negotiations were interested in securing formal treaty provisions that would help them to successfully adapt to the new socio-political and socio-economic landscape created by the arrival of colonial newcomers, non-indigenous parties to historic treaty negotiations (i.e. colonial representatives of the Crown) were interested in securing formal treaty provisions that would facilitate the social, cultural, economic and political assimilation of Indigenous Peoples into ‘Western-European’/‘Canadian’ society. It goes without saying, then, that the nature and intent of the historic ‘land surrender’ treaties was (and remains) the subject

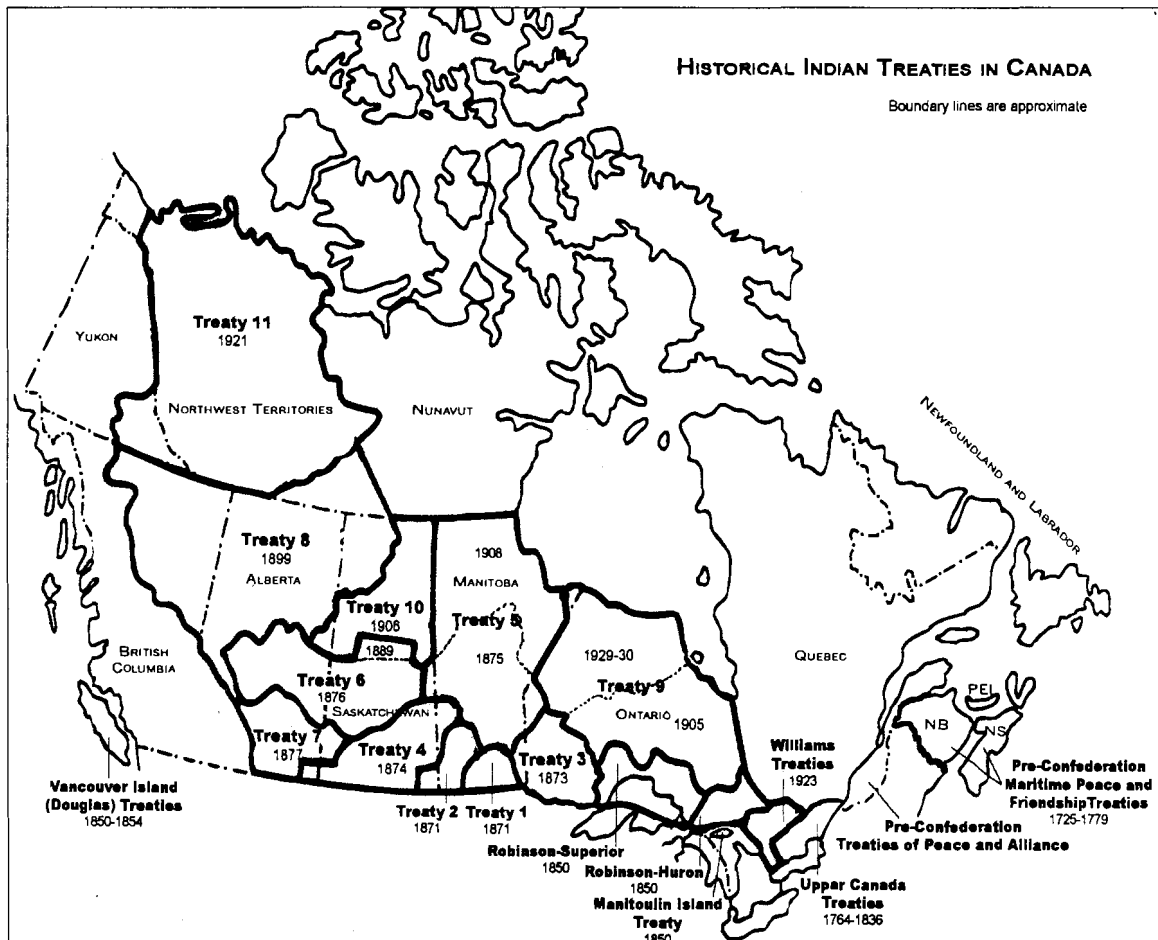
¹³ For a more detailed discussion of the historic treaties see: Robert Mainville, *An Overview of Aboriginal and Treaty Rights and Compensation for their Breach* (Saskatoon: Purich Publishing, 2001); Miller (2000), ch. 1-9; and, Alexander Morris, *The Treaties of Canada with the Indians of Manitoba and the North-West Territories Including the Negotiations on which they were Based* (1991 reprint; Toronto: Coles Publishing, 1880). For an Indigenous Peoples’ perspective on the historic treaties see: Treaty 7 Elders and Tribal Council, *The True Spirit and Original Intent of Treaty 7* (Montreal & Kingston: McGill-Queen’s University Press, 1996), esp. ch. 3; John Borrows, “Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch (ed), (Vancouver: UBC Press, 1997), pp. 156-172; and, Sharon Venne, “Understanding Treaty 6: An Indigenous Perspective” in Michael Asch (ed), *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference* (Vancouver: UBC Press, 1997), pp. 173-207.

¹⁴ See, for example: Venne (1997), esp. pp. 194-202.

of very different understandings on the part of Indigenous and non-indigenous signatories (see subsection (iv) below for a more detailed discussion of this point).

Figure 5 - Map of Historic Indian Treaties

Note: According to the Department of Indian Affairs and Northern Development, there are approximately 68 known historic treaties between Indigenous Peoples and the Crown. National Archives estimates, however, place the number of known historic treaties at nearly 600.¹⁵



Source: Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (3rd ed; Saskatoon: Purich Publishing, 2004), p. xxvi. Reproduced with permission of the author and publisher.

¹⁵ Assembly of First Nations, "Treaties With the Crown", *Fact Sheet* (May 2000), p. 2.

After the signing of the Williams Treaty in 1923, however, colonial authorities' "attention turned away from the question of dealing with the native interest in land, as all the areas that had been needed for settlement or development had now been secured through the treaties and the lands that remained were not immediately needed for such purposes."¹⁶ As a result, the policy of securing Indigenous consent before trespassing upon 'unsurrendered' traditional territories slowly fell into abeyance.

iv) The Nature and Intent of the So-Called Historic 'Land Surrender' Treaties

Although the terms of the so-called historic 'land surrender' treaties clearly reflect a change in priorities on the part of imperial, colonial and dominion authorities, the treaty priorities of Indigenous Peoples remained unaltered in the post-1763 period. Provided with copies of the *Royal Proclamation of 1763*, the Indigenous Peoples of Canada believed that their understanding of treaties (outlined above) was mutually understood and accepted.¹⁷ They were later appalled to discover that their European 'friends' presumed to have extinguished their territorial rights and sovereign authority through the post-1763 treaty process. As Allan McMillan explains:

Native people whose ancestors signed treaties tend to view these documents as recognition of their sovereign status and affirmation of their aboriginal rights. The treaties provide for a continuing relationship between Canada and First Nations. Governments and non-aboriginals, however, tend to see the treaties as historic agreements which extinguished aboriginal rights to the land and established federal control over the lives of Native people.¹⁸

¹⁶ Canada, Indian and Northern Affairs – ONC (1978), p. 2.

¹⁷ See: Burrows (1997), pp. 155-172.

¹⁸ Alan McMillan, *Native Peoples and Cultures of Canada* (2nd ed.; Vancouver/Toronto: Douglas & McIntyre, 1995), p. 316.

To support their position, Canadian authorities point to the written terms of the ‘lettered’ and ‘numbered’ treaties, which closely resemble deeds of sale. Indigenous people, however, dispute the validity of these terms, arguing that there were great differences between the treaty agreements their ancestors negotiated and consented to (as recorded in oral history) and the formal documents themselves (as recorded in written form by colonial authorities, frequently sometime *after* their formal conclusion).¹⁹ As explained by the Assembly of First Nations:

The written words of a treaty document alone can not be relied upon to provide the whole picture of the promises exchanged in these gatherings. These written sources are often biased in favour of the Crown. They are written in English, not the Aboriginal language of the negotiation, utilized technical legal words and their transcription was usually in the hands of non-Aboriginal parties. It is unclear whether these written documents were translated into the Aboriginal languages since the legal concepts and language written in the documents did not exist in Indian languages. Since concepts such as surrender, sale or ‘give away’ land did not exist in the Aboriginal languages it is unlikely that this could have been conveyed to the Aboriginal party.²⁰

Indigenous people also argue that the legal validity of the so-called ‘land surrender’ treaties is decidedly put into question by the fact that many of the terms of these historic agreements have not been honourably upheld by the Crown (now embodied in the federal and provincial government of Canada).

Although not inconsequential disagreement about the nature and intent of the historic ‘land surrender’ treaties continues, what is crucial is that their undisputed existence has provided Indigenous people with documented evidence of colonial and dominion authorities’ adherence to the terms of the *Royal Proclamation of 1763* during

¹⁹ See, for example: Treaty 7 Elders and Tribal Council (1996); Borrows (1997), pp. 156-172; and, Venne (1997), pp. 173-207.

²⁰ Assembly of First Nations (with John Borrows) (2002), p. 6.

the early phases of the colonial settlement process, and, by logical extension, with persuasive evidence of these same authorities' acceptance of this royal prerogative's recognition of Indigenous Peoples' pre-existing rights in respect of their traditional territories. This evidence of recognition is particularly important given the enduring relevance of the *Royal Proclamation of 1763*.

v) *The Contemporary Relevance of the Royal Proclamation of 1763*

Strictly speaking, the *Royal Proclamation of 1763* is an Executive Order having the force and effect of an ordinary Act of Parliament.²¹ Having never been repealed outside of the province of Quebec²², however, it continues to have the force of law in Canada and is referenced in s. 25 of the constitutionally entrenched *Charter of Rights and Freedoms* which reads:

The guarantee in the Charter of certain rights and freedoms shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights and freedoms that pertain to the aboriginal peoples of Canada including

- (a) any rights or freedoms that have been recognized by the Royal Proclamation of October 7, 1763; and

²¹ Thomas Isaac, *Aboriginal Law: Cases, Materials and Commentary* (2nd ed.; Saskatoon: Purich, 1999), p. 3.

²² Clause IV of the *Quebec Act, 1774* repeals the *Royal Proclamation of 1763* with respect to Quebec "relative to the Civil Government and Administration of Justice in the said Province." It bears noting, however, that in *Bear Island Foundation v. Ontario (Attorney General)* (1989); 68 O.R. (2d) 394; [1984] 2 CNLC 73 (OCA) the Ontario Court of Appeal held that "... the relevant procedural aspects of the Proclamation [i.e. the indigenous land surrender requirements] were repealed by the *Quebec Act, 1774* (UK), c. 83. [R.S.B.C. 1970, App. II No. 2] ... [T]he procedural requirements for purchase 'at some public Meeting or Assembly ...' was repealed" [at para 233; see also paras 199 and 202]. Subsequent decisions of the Ontario Court of Appeal, however, appear to assume that the land surrender requirements of the *Royal Proclamation of 1763* remain in force in the wake of the *Quebec Act* (see, for example: *Skerryvore Ratepayers Ass. v. Shawanaga Indian Band* (1993), 16 O.R. (ed) 390 and *Chippewas of Kettle and Stoney Point v. Canada* (1996) 141 DLR (4th) 1 (O.C.A.)). Given that the *Quebec Act, 1774* makes no mention of 'Indians' and no Supreme Court decision to date has held that the *Quebec Act, 1774* repealed those provisions of the *Royal Proclamation of 1763* that apply to indigenous land acquisition, it is more than reasonable to assume that these provisions remain in continuing force and of continuing effect.

- (b) any rights or freedoms that may be acquired by the aboriginal peoples of Canada by way of land claims settlement.

Although the legal recognition afforded native title by the *Royal Proclamation of 1763* was not consistently affirmed in legal and political practice in Canada between 1763 and 1973 (see chapter 2) it has, at a minimum, consistently served as a powerful reminder of Indigenous Peoples' legal interests in their traditional territories and of Imperial desires to respect those legal interests in the wake of British sovereignty.

II – THE RECOGNITION OF INDIGENOUS RIGHTS TO LAND DURING AUSTRALIA'S EARLY COLONIAL SETTLEMENT PERIOD

The European settlement of Australia began in 1788 with the establishment by the British of a penal colony on the site now known as Sydney. At the time, there are estimated to have been between 300 000 and 600 000 Indigenous people inhabiting the continent.²³ Despite this fact, “[w]hen Arthur Phillip arrived in Australia with the First Fleet in 1788 his instructions omitted any reference to the seeking of Aboriginal consent for actions. The instructions, were, however, quite clear in their recognition of Native existence; in their desire to achieve harmonious coexistence; and in their application of punitive consequences for crimes and wrong-doing.”²⁴ Despite the physical presence of Indigenous people in Australia and their recognition in colonial instructions, however,

²³ Jean-François Tremblay and Pierre-Gerlier Forest, “Australia”, in *Aboriginal Peoples and Self-Determination: A Few Aspects of Government Policy in Four Selected Countries*, Groupe de recherche sur les interventions gouvernementales - Université Laval (Québec: Secrétariat aux affaires autochtones, 1993), p. 31.

²⁴ Janice Gray, “The *Mabo* Case: A Radical Decision?” *Canadian Journal of Native Studies* 17:1 (1997), p. 41.

Australia was defined as legal *terra nullius* from 1788 to 1992. How could this be? The answer lies in Imperial law and colonial policy.

i) Imperial Law

During the early centuries of colonial expansion, the European powers involved came to an agreement among themselves that new territory could be acquired either by the conquest or cession of occupied territories or by the discovery and settlement of unoccupied territories or *terra nullius*. Where Indigenous populations were encountered (and conquest or cession were not in evidence), however, the European powers faced a problem. This problem was resolved ontologically. The inhabited lands, it was decided, could “simply [be] *deemed* to be legally *uninhabited* if the people were not Christian, not agricultural, not commercial, not ‘sufficiently evolved’ or simply in the way” (emphasis original).²⁵

This so-called ‘doctrine of discovery’ was particularly easy to apply in the Australian case given the information provided to British authorities by members of Captain Cook’s 1770 expedition to eastern Australia. As explained by Henry Reynolds:

Most information came from the members of Cook’s expedition, and especially from Sir Joseph Banks, who reported in his journal that eastern Australia was ‘thinly inhabited even to admiration’. The expedition had seen no large gatherings and the evidence provided by camp sites and huts ‘convinced us of the smallness of their parties’. Banks and his colleagues had never seen the inland. [Banks] admitted that ‘what the immense tract of country may produce is to us totally unknown’. But he made the extremely erroneous assessment that ‘we may have liberty to conjecture that [it is] totally uninhabited’. Why so bold, so inaccurate, so portentous a conclusion? It would be best to let Banks explain in his own words. The sea, he argued

²⁵ Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talon Books, 1998), p. 48.

Has I believe been universally found to be the cheif [sic] source of supplys [sic] to Indians ignorant of the arts of cultivation: the wild produce of the land alone seems scarce able to support them at all seasons at least I do not remember to have read of any inland nation who did not cultivate the ground more or less, even the North Americans who were so well versed in hunting sowed their Maize. But should a people live inland who supported themselves by cultivation these inhabitants of the sea coast must certainly have learn'd to imitate them in some degree at least, otherwise their reason must be suppos'd to hold a rank little superior to that of monkies [sic].²⁶

Although colonial settlers quickly realized the error of Banks' assumptions, "the theory of an uninhabited continent was just too convenient to surrender lightly. Consequently, the gap between law and reality, law and colonial experience grew progressively wider."²⁷ As Henry Reynolds explains:

When the presence of inland Aborigines was impossible to overlook it was assumed they were merely stragglers driven away from coastal fishing grounds by more powerful enemies. But contact with more distant clans increased. In April 1791 [Captain] Tench spoke to a man who told him that his people depended 'but little on fish' and that their principle support was derived from small animals and yams which they dug 'out of the ground'. Later expeditions gradually increased the Europeans' knowledge of Aboriginal land use. By 1802 Francis Barrallier was able to provide a list of many varieties of food used by inland blacks who 'appeared to be good hunters'.²⁸

A major characteristic which Europeans newcomers attributed to hunter-gatherer and pastoral-nomad societies, however, was their incessant wandering. As a result, "[s]till well stocked with classical allusions they imagined that Aborigines were ever on the

²⁶ Henry Reynolds, *The Law of the Land*, (2nd ed; Ringwood: Penguin Books, 1992), p. 31 (referencing, J. Banks, *The 'Endeavour' Journals, 1768-1771* [2 vols; Sydney: Angus & Robertson, 1962], vol. 2, pp. 122-123).

²⁷ *Ibid*, p. 32.

²⁸ *Ibid*, p. 57.

move, with no sense of property or local 'attachments'.²⁹ This erroneous assumption had grave consequences for the degree of recognition and respect provided to indigenous rights to land during Australia's early colonial settlement period.

ii) Colonial Policy

In Australia, there was no colonial competition for lands and resources. As a result, early European newcomers were not compelled to interact with Indigenous Peoples for strategic reasons. As explained by Steward Harris:

It was the Indian experience in North America to become involved in the conflicts of rival European powers for their tribal lands. In these conditions, it was in the interests of the European powers to win tribes as allies, by treaty, and this gave the tribes diplomatic power ... In Australia, [however,] the Aborigines were always on their own against the one, single European invader, from Britain ... They had no possible allies, no opportunity for diplomacy and treaty-making.³⁰

This lack of strategic interaction led Indigenous Peoples and European newcomers to grossly misinterpret the nature of their earliest encounters. As explained by Henry Reynolds:

As a general rule clans did not react immediately to European trespass although illusions of returning relatives or fear of guns may have significantly modified their behaviour. Indeed the history of inland exploration indicates that local groups tolerated the passage of European expeditions provided they behaved with circumspection. On many occasions Aborigines' hospitality allowed squatting parties to establish themselves and even assisted them during the first few weeks of their occupation. Clearly white and black perceptions of what was taking place were very wide apart. Unless forewarned Aborigines probably had no appreciation of the European's determination to stay indefinitely and

²⁹ Ibid, p. 58.

³⁰ Steward Harris (for the Aboriginal Treaty Committee), *'It's Coming Yet ...': An Aboriginal Treaty Within Australia Between Australians* (Canberra: The Aboriginal Treaty Committee, 1979), p. 21.

'own' the soil. After all the first white intruders came and went again in a way that would have fully accorded with black expectations ...

If blacks often did not react to the initial invasion of their country it was because they were not aware that it had taken place. They certainly did not believe that their land had suddenly ceased to belong to them and they to their land. The mere presence of Europeans, no matter how threatening, could not uproot certainties so deeply implanted in Aboriginal custom and consciousness ... But Aborigines reacted less to the original trespass than to the ruthless assertion of Europeans of exclusive proprietary rights ... Anger about European possessiveness was clearly one of the motives behind the taking and destruction of their stock and their property.³¹

Ignorant of the complex structures of Indigenous societies, which were (and are) based on people's relationships with the land, European newcomers misinterpreted Indigenous people's initially benign reactions to their physical presence on traditional Indigenous territories. Seeing no evidence of permanent settlements or intensive (i.e. agricultural) land uses, they quickly concluded that the concept of land ownership was not known to the Indigenous people of Australia.³² As a result, when Indigenous people did eventually react to European newcomers' assertions of proprietary ownership over their traditional territories (i.e. by taking and destroying European newcomers' stock and other property), their actions were interpreted as unprovoked as thus indicative of Indigenous people's 'barbaric' nature.

In sum, although the British policy of recognizing native title and negotiating nation-to-nation treaties with Indigenous Peoples was well known at the time (between 1693 and 1862 the colonial Crown signed more than forty treaties with Indigenous

³¹ Henry Reynolds, *The Other Side of the Frontier* (Townsville: History Department, James Cook University, 1981), as quoted in H. McRae, G. Nettheim and L. Beacroft, *Aboriginal Legal Issues* (Sydney: The Law Book Company Ltd, 1991), p. 13.

³² Australia, Department of Foreign Affairs and Trade – Overseas Information Branch, "The First Australians" *Fact Sheet* (February) 1993.

Peoples in British North America³³), the early colonial authorities of Australia viewed the treaty process as primarily applicable to North America where the Indigenous population was regarded as relatively ‘civilized’.³⁴ As a result, in the absence of any formal Imperial instructions on the acquisition of traditional Indigenous territories, the colonies of Australia were settled with an absolute disregard for indigenous rights to land.

iii) Batman’s Treaty

The one notable exception to this general state of affairs is the 1835 ‘Batman Treaty’ which was concluded between settler John Batman and several ‘chiefs’ of the Dutigalla tribe. According to the terms of this treaty, Batman acquired some 600,000 acres of land around present-day Melbourne and Geelong in exchange for some blankets, other articles and a perpetual annual rent. Shortly after its conclusion, however, Governor Bourke proclaimed Batman’s treaty ‘void and of no effect against the rights of the Crown’ and Batman himself a trespasser on Crown land.³⁵

More than a century later, Justice Blackburn considered this official reaction to Batman’s treaty as evidence of native title’s exclusion from the common law of Australia.³⁶ According to Rosemary Hunter, however, “[a]n alternative interpretation is that the proclamation was consistent with the common law recognition of native title, which was extinguishable only by the Crown. In accordance with the doctrine of tenure, white settlers could acquire land only from the Crown, not through direct transaction with

³³ Paul Havemann, “Chronology 3: Indigenous Rights in the Political Jurisprudence of Australia, Canada and New Zealand”, in *Indigenous Rights in Australia, Canada, and New Zealand*, Paul Havemann (ed), (Auckland: Oxford University Press, 1999), p. 25.

³⁴ Bradford Morse, *Aboriginal Self-Government in Australia and Canada* (Kingston: Institute of Intergovernmental Relations – Queen’s University, 1984), p. 7.

the Aborigines.”³⁷ The fact that there are no other recorded attempts to secure treaty agreements with the Indigenous Peoples of Australia, however, belies the significance of this novel interpretation.

iv) Other Evidence of Indigenous Land Rights Recognition

According to Henry Reynolds, however, within a few years of their arrival “the officers of the First Fleet has learnt enough about traditional Aboriginal society ... to see the error in the assumption that tribes wandered wheresoever inclination prompted.”³⁸ This conclusion was supported by evidence gathered by settlers in all parts of the continent during the first half of the nineteenth century:

In his book *Observations of the Colonies of New South Wales and Van Diemens Land*, James Henderson summed up the generally accepted view of Aboriginal territoriality explaining that although various tribes had no settled place of residence ‘the limits of their respective hunting grounds appear to be distinctly recognized’. The explorer George Grey believed that every Aborigine knew the limit of his own land and could ‘point out the various objects which mark his boundary’. The prominent cleric J.D. Lang concurred arguing that boundaries were ‘well known and generally respected by them’. The Quaker missionary James Backhouse wrote after visiting Western Australia that it was

quite clear that the natives ... from Swan River to King George Sound recognize their distinct hunting grounds as the private property of the different families, and that the boundaries are distinctly defined ... they have their private property clearly distinguished into hunting grounds, the boundaries of which are definite, trees being often recognized by them as landmarks.³⁹

³⁵ This proclamation was published in the *NSW Government Gazette*, 2 September 1835.

³⁶ See: *Milirrpum v. Nabalco Pty. Ltd.* [1971] 17 FLR 141 (NTSC).

³⁷ Rosemary Hunter, “Aboriginal histories, Australian histories and the law” in Brian Attwood (ed) *In the Age of Mabo: History, Aborigines and Australia* (St. Leonards: Allen & Unwin, 1996), p. 9

³⁸ Henry Reynolds, *Aboriginal Sovereignty: Three Nations, One Australia?* (St. Leonards: Allen & Unwin, 1996), p. 24.

³⁹ *Ibid*, p. 26.

These observations and others like them led many colonial officials to adopt the view that Indigenous people were originally in possession of their traditional territories and that they had a recognizable form of land tenure. For example:

Governor King prepared a confidential memo for his successor Bligh in which he remarked that he had ‘ever considered them [i.e. the Aborigines] the real Proprietors of the Soil’. In 1821, Governor Brisbane told a visiting missionary that the British were taking the land ‘from the Aborigines of their country’. The Tasmanian Colonial Secretary referred to the Island blacks who had been ‘removed from their native soil’; Governor Arthur wrote of the settlers as ‘intruders on their native soil’; his successor, Franklin, argued that the settlers had taken possession of the land ‘to which these poor creatures have a natural right’; and Governor Denison referred to the Aborigines as the ‘former owners of the soil’. In Western Australia, Governor Hutt wrote of the Europeans taking ‘possession of their countries’. On the other side of the continent, Governor Gipps issued an official statement to the Aborigines as ‘the original possessors of the soil’; and his Colonial Secretary issued another alluding to them as ‘the Aboriginal Possessors of the Soil’. In South Australia, Governor Gawler argued that the local Aborigines had ‘very ancient rights of proprietary and hereditary possession’; and Charles Sturt, his Land Commissioner, referred to their ‘natural indefeasible rights ... vested in them as a birth rights’.⁴⁰

According to Henry Reynolds, “[i]t would be possible to add to this list the comparable views of Colonial Office officials, prominent British reformers, distinguished visitors to the colonies, prominent settlers, missionaries and clergymen.”⁴¹

Unfortunately for the Indigenous Peoples of Australia, however, this evidence of recognition did not translate into any meaningful legal or political accommodation of indigenous rights to land during the early colonial settlement era, as the historical record clearly indicates.⁴² In sum, in the absence of competing colonial powers and formal Imperial instructions on Indigenous land acquisition, the pre-existing territorial rights of

⁴⁰ Henry Reynolds, “Native title and historical tradition: past and present”, in Attwood (1996), pp. 25-26.

⁴¹ Ibid.

Australia's Indigenous Peoples were accorded little to no formal or informal recognition during the early era of colonial settlement. As a correspondent wrote in the *Sydney Gazette* in 1824:

... the very notion of property, as applicable to territorial possession, did not exist among them [i.e. the Indigenous Peoples of Australia]. They had no civil polity, no regular organised frame of society, on the regulations of which the distinction of landed property depends. Which tribe, or which individual, could with propriety be considered as the proper owner of any particular district? Each tribe wandered about wheresoever inclination prompted, without ever supposing that any one place belonged to it more than to another. They were the *inhabitants*, but not the *proprietors* of the land. This country then was to be regarded as an unappropriated remnant of common property; and, in taking possession of it, we did not invade another's right, for we only claimed that which before was unclaimed by any [emphasis original].⁴³

CONCLUSION

According to the definition of path dependence set forth in the Introduction to this study, "path dependence characterizes specifically those historical sequences in which contingent events set into motion institutional patterns that have [relatively] deterministic properties."⁴⁴ As this chapter has explained, the initial degree of recognition provided to Indigenous Peoples' rights in respect of their traditional territories was largely contingent upon the reasons (or lack thereof) Indigenous people and European newcomers had for interacting during the earliest years of the colonial settlement period. In the Canadian case, these reasons included: (i) European newcomers desire to secure the peace and friendship of Indigenous Peoples in the face of competition for valuable lands and

⁴² For a more detailed examination of the legal and political arguments used to justify the European settlement of Australia see: Reynolds (1992).

⁴³ 'Amacitia', 19 August 1824, as quoted in Reynolds (1996a), pp. 23-24.

⁴⁴ James Mahoney, "Path Dependence in Historical Sociology", *Theory and Society* 29:4 (2000), p. 507.

resources; (ii) Indigenous Peoples desire to secure the peace and friendship of European newcomers in order to facilitate their own strategic interests; and, (iii) European newcomers obligation to adhere to the terms of a royal prerogative (i.e. the *Royal Proclamation of 1763*), which recognized Indigenous Peoples as lawful land owners. In the Australian case, by contrast, there were virtually no compelling reasons for European newcomers and Indigenous people to interact during the earliest years of colonial settlement given that: (i) European newcomers assumed that the vast continent they were exploring was ‘thinly inhabited even to admiration’; (ii) European newcomers assumed that the Indigenous people they did encounter were ‘uncivilized’ nomads who wandered and used, but did not own, the land; (iii) Indigenous Peoples did not initially realize that their traditional territories were being expropriated by European newcomers; and, (iv) the British Crown issued no formal instructions on the lawful acquisition of Indigenous Peoples’ traditional territories in the wake of British sovereignty.

In sum, “[f]rom the earliest day of European settlement in North America, the relationship between Indians and non-Indians was characterized by an assumption on the part of colonial governments that native people had an interest in the land which had to be dealt with before non-native settlement or development could take place.”⁴⁵ In Australia, by contrast “[a] critical assumption made about the Aborigines, both before and after settlement, was that they were nomadic, had no permanent homelands and therefore were not in effective possession of the land over which they wandered.”⁴⁶ As the following chapters will now demonstrate, these initial and historically contingent degrees of recognition and respect provided to indigenous rights to land during the

⁴⁵ Canada, Indian and Northern Affairs – ONC (1978), p. 2.

earliest years of colonial settlement in Canada and Australia provide an important backdrop for Indigenous Peoples' long and continuing struggle to obtain native title recognition and respect from the legal and political institutions of their respective colonizers.

⁴⁶ Reynolds (1996a), p. 23.

CHAPTER 2

THE RECOGNITION OF NATIVE TITLE IN LAW AND POLICY¹

The unique common law real property right identified as 'native title' has been recognized in law and policy in both Canada and Australia. As this chapter will demonstrate, however, the degree of legal and political recognition afforded native title is notably more extensive and secure in Canada than it is in Australia. This is not to say that the fight to attain a meaningful accommodation of native title and its accompanying rights is over in Canada; indeed, the Indigenous Peoples of Canada are still fighting to remove the limitations and restrictions placed on native title by the non-indigenous legal and political institutions through which it has been negotiated (see chapters 3-7). The point of this chapter, rather, is that Canada's initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners has facilitated this concept's contemporary recognition to a greater extent than has Australia's initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants or land users. This point will be demonstrated through a critical comparative examination of the

¹ This chapter represents a significantly revised and expanded version of the following publication: Karen E. Lohead, "Reconciling Dispossession: The Recognition of Native Title in Canada and Australia", *International Journal of Canadian Studies*, 24 (Fall 2001), pp. 17-42.

roads leading to native title's recognition at common law, in statute law, and in central government policy².

I – THE LEGAL AND POLITICAL RECOGNITION OF NATIVE TITLE IN CANADA

Following the recognition of indigenous rights to land in the *Royal Proclamation of 1763* and the signing of numerous 'land surrender' treaties, a 'common sense' myth took hold in Canada that the necessity of treatying with Indigenous Peoples was founded on benevolence or pragmatic politics and not on the legal rights of Indigenous Peoples in respect of their traditional territories. The matter at issue was essentially whether the *Royal Proclamation of 1763* recognised pre-existing indigenous rights to land (and hence recognises the existence of *sui generis* native title) – the assertion of Indigenous Peoples - or whether it created indigenous rights to land (and hence only recognises some form of 'ordinary' common law land rights exclusively claimable by Indigenous Peoples) – the assertion of Canadian governments, economic interests, and many non-indigenous Canadians.³

² According to David Elliott (1985), the English legal system (to which both Canada and Australia owe allegiance) recognizes three 'direct' sources of law: (a) royal prerogative (Crown-made law – which was discussed in chapter 1); (b) common law (judge-made law); and, (c) statute law (government-made law), which includes general legislation, subordinate legislation and constitutional enactments. The distinction between statute law and government policy is subtle yet important. Statute law is essentially government policy given the force of law by its incorporation into justiciable legislation. Government policy, by contrast, refers to a government's official position on an issue, often articulated in a formal policy statement, and is absent the force of law (i.e. it is non-justiciable). Both statute law and government policy can be changed according to the whim and will of the government of the day. Changing statute law, however, is considerably more difficult owing to the requirement of parliamentary and constitutional procedures.

Given the absence of native title legislation in lieu of native title policy in the Canadian case and the absence of native title policy in lieu of native title legislation in the Australian case, Australia's *Native Title Act* and Canada's comprehensive claims policy have been treated as equivalent (but not identical) sources of native title recognition in this study.

³ For discussion of historic legal and political interpretations of the *Royal Proclamation* see: Bruce A. Clark, *Indian Title in Canada*. (Toronto: Carswell, 1987).

St. Catherine's Milling and Lumber Company v. The Queen (1889)⁴ was the first Canadian court decision to substantively discuss this issue, and although this decision did not ultimately result in the recognition of native title at common law, it did confirm the existence of a unique form of Crown derived land rights (i.e. 'Indigenous land rights') at common law, thus making it an important legal landmark on the road to formal native title recognition in Canada.

i) The Recognition of Indigenous Land Rights at Common Law: St. Catherine's Milling and Lumber Company v. The Queen (1889)⁵

The central issue disputed in the *St. Catherine's Milling* case was the validity of a permit to cut lumber granted to a private company (St. Catherine's Milling and Lumber) by the federal government. The permit was granted over a tract of land within Ontario's provincial boundaries, which had been surrendered by the Ojibway Nation (in 1873) under the terms of *Treaty 3*. The case was initiated in 1885 by the province of Ontario, which claimed that the federally issued permit was *ultra vires*. The federal government, intervening on behalf of St. Catherine's Milling and Lumber Company, countered with

⁴ *St. Catherine's Milling and Lumber Company v. The Queen* (1889) 14 AC 46, 2 CNLC 541 (JCPC), (1887) SCR 577 (SCC); (1886) 13 OAR 148 (Ont. CAO); (1885) 10 or 196 (Ont. Ch.).

⁵ This case was initiated in 1885 when the Province of Ontario filed a writ against St. Catherine's Milling and Lumber Company in the Chancery Division of the High Court of Ontario. This writ sought: (1) a declaration that the appellants have no rights in respect of the timber cut by them upon the lands specified in their permit; (2) an injunction restraining them from trespassing on the premises and from cutting any timber thereon; (3) an injunction against the removal of timber already cut; and (4) a decree for the damage occasioned by their wrongful acts. This case passed through all lower court divisions with judgement falling in favour of the province (on 10 June 1885, the Chancellor of Ontario ruled with costs against St. Catherine's Milling and Lumber; on 20 April 1886, the decision of the Chancellor was unanimously affirmed by the Court of Appeal for Ontario; and on 20 June 1887 the Supreme Court of Canada dismissed the St. Catherine's Milling and Lumber Company's appeal by a four to two majority) before it was appealed to the Judicial Committee of the Privy Council (JCPC). When the Crown granted leave to appeal to the JCPC in 1887, it also directed that the Government of the Dominion of Canada should be at liberty to intervene in the appeal, given that the case at hand related both to the right of the Government of Canada to

the argument that it had acted well within its constitutional authority when it issued the permit in question. In sum, the court was asked to determine whether the federal government or the government of Ontario had beneficial interest in the tract of land in question. As will now be explained, however, the arguments presented by both the provincial and federal governments, as well as the ultimate decision of the Judicial Committee of the Privy Council (henceforth, the JCPC)⁶ all hinged on the nature of the Ojibway's rights to the tract of land in question prior to the signing of *Treaty 3*.

a) The Federal Government's Argument

The federal government's argument in this case rested on the premise that the Ojibway had held legal rights to the land in question both prior to the signing of *Treaty 3* and prior to the Crown's assertion of sovereignty. These pre-existing legal rights (i.e. 'native title'), it was asserted, were formally acknowledged in the terms of the *Royal Proclamation of 1763*, which confirmed Indigenous Peoples' proprietary ownership of all unceded land in the British colonies of North America. As the federal government argued before the Court:

... from the earliest times the Indians had, and were always recognised as having, a complete proprietary interest, limited by an imperfect power of alienation [that being alienation to no other than the Crown] ... such complete title [was] uniformly recognised: see Royal Proclamation October 7, 1763, held by Lord Mansfield in *Campbel v. Hall* (2) 1 Cowp. 204 to have the same force as a statute, under which the lands in suit were reserved to the Indians in absolute proprietary right ... The Royal

dispose of the timber in question, and to the legal consequences of the 1873 treaty concluded between the Government of Canada and the Ojibway.

⁶ The Judicial Committee of the Privy Council was Canada's highest judicial authority until 1949 when the Supreme Court of Canada assumed this role.

Proclamation was uniformly acted on and recognised by the Government as well as the legislature, and was regarded by the Indians as their charter.⁷

As a result, the federal government's argument continued, the terms of *Treaty 3* had transferred 'beneficial interest' in the land in question (meaning the full content of the legal right to the lands in question) from the Ojibway to the federal government by virtue of sec. 91(24) of the *British North America Act, 1867* (this section confers exclusive legislative jurisdiction over 'Indians, and the Land reserved for Indians' on the federal Parliament). As explained in Court:

The absolute title being in the Indians was ceded by them, subject to certain reservations, for valuable consideration to the Dominion, and the treaty to that effect [does] not enure to the benefit of the Province in any way. The Province [can] not claim property in the land except by virtue of the Act of 1867, and as regards that Act the lands did not belong to the Province prior thereto within sect. 109^[8]; they were not in 1867 public property which the Province could retain under sect. 117^[9]; they were not public lands of the Province within sect 92, sub-sect. 5^[10]. [emphasis added]¹¹

⁷ *St. Catherine's Milling and Lumber v. The Queen* (1888) 2 CNLC 541, at 543.

⁸ Sec. 109 reads as follows: "All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same." (The four western provinces – Manitoba, Saskatchewan, Alberta and British Columbia – were placed in the same position as the original provinces by the *British North America Act, 1930*, 21 Geo. V, c. 26 (U.K.)).

⁹ Sec. 117 reads as follows: "The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country."

¹⁰ Sec. 92(5) reads as follows: "In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next herein-after enumerated; that is to say, — ... 5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon."

¹¹ *St. Catherine's Milling and Lumber*, *supra* note 7 at p. 544.

b) The Province of Ontario's Argument

The Province of Ontario countered with the argument that prior to the signing of *Treaty 3*, the underlying title to all the land at issue was held by the Crown (not the Ojibway), by virtue of the 'doctrine of discovery'. The 'doctrine of discovery', as set out in a 1722 Memorandum of the JCPC, permitted uninhabited territories or *terra nullius* ('land belonging to no one') to be acquired by the Crown through the simple declaration of Crown sovereignty. (As it was applied on the ground, however, the 'doctrine of discovery' permitted land occupied by indigenous inhabitants to be declared a legal (if not practical) *terra nullius* if the indigenous inhabitants concerned were deemed to be too low on the 'ladder of social evolution' to be capable of holding legally recognizable property rights). Given that Ontario had been a legal *terra nullius* prior to the Crown's acquisition of sovereignty, the Province of Ontario argued, the terms of the *Royal Proclamation of 1763* had created (not recognized) the legal rights of the Ojibway to the land in question.

In other words, the Province of Ontario argued that the Crown (not the Ojibway) had held the underlying title to the land at issue prior to the signing of *Treaty 3*, the legal rights of the Ojibway being limited to 'personal interest' rights delegated by the Crown. As was argued before the Court:

With regard to the alleged absolute title of the Indians to which the Dominion is said to have succeeded by treaty, no such title existed on their part either as against the King of France before conquest or against the Crown of England since the conquest. *Their title was in the nature of a personal right of occupation during the pleasure of the Crown, and it was not a legal or an equitable title in the ordinary sense ...* As regards the proclamation ... it was not intended to divest, and did not divest, the Crown of its absolute title to the lands, and the reservation, upon which so much argument has been rested, was expressed to last only 'for the present

and until Our further pleasure be known'. ... *the interests which they [the Indians] possessed under the proclamation ... was a mere licence terminable at the will of the Crown.* [emphasis added]¹²

Because the terms of *Treaty 3* had extinguished the Ojibway's 'personal interest' rights to the land in question, the Province of Ontario concluded, the land in question became 'unburdened' Crown land and the 'beneficial interest' was thus vested in the Province of Ontario by virtue of sec. 109 of the *British North America Act, 1867*, which reads: 'All [Crown] Lands, Mines, Minerals and Royalties ... shall belong to the several Provinces'. As was argued before the Court:

With regard to the application of the British North America Act and the construction to be placed upon it ... The general scheme, purpose and intent of the Act should be borne in mind. The scheme is to create a federal union consisting of several entities. The purpose was at the same time to preserve the Provinces, not as fractions of a unit, but as units of a multiple. The Provinces are to be on an equal footing. The ownership and development of Crown land and the revenues therefrom are to be left to the Provinces in which they are situated. As to legislative power, it is the residuum which is left to the Dominion; as to proprietary rights, the residuum goes to the Provinces. Where property is intended to go to the Dominion it is specifically granted, even though legislative authority over it may already have been vested in the Dominion. It is contrary to the spirit of the Act to hold that the grant of legislative power over lands reserved for the Indians carries with it by implication a grant of proprietary right.¹³

c) The JCPC's Decision

In its 12 December 1888 ruling, the JCPC did not consider it necessary to determine the exact status of the Ojibway's legal rights to the land in question prior to the declaration of British sovereignty. It did, however, opine that *if* some form of proprietary

¹² Ibid, at pp. 544-545.

land holding pre-dated the declaration of British sovereignty, it would most certainly be characterized at common law as a proprietary right inferior to a 'title in fee simple' (the highest form of land tenure recognized by the common law).

The JCPC did, however, affirm that the Ojibway had held a legal interest in the land in question prior to the signing of *Treaty 3*. This legal interest was ascribed to the *Royal Proclamation of 1763* and was described by Lord Watson as a "personal and usufructuary right, dependent upon the good will of the Sovereign."¹⁴ In other words, the Court determined that the Crown-issued *Royal Proclamation of 1763* had given the Ojibway a legally defensible right of permissive use and occupancy in respect of the land in question. This limited 'land right', the JCPC ruled, was terminated by *Treaty 3* with nothing transferred – the land became Crown land and the beneficial interest thus passed to the Province of Ontario by virtue of sec. 109 of the *British North America Act, 1867*.

As explained by Lord Watson:

By the treaty of 1873 the Indian inhabitants ceded and released the territory in dispute, in order that it might be opened up for settlement, immigration, and such other purpose as to Her Majesty might seem fit, to the Government of the Dominion of Canada, for the Queen and Her successors forever ... The treaty leaves the Indians no right whatever to the timber growing upon the land which they gave up, which is now fully vested in the Crown, all revenues derivable from the sale of such portions of it as situated within the boundaries of Ontario being the property of the Province ...¹⁵

¹³ Ibid, at p. 545.

¹⁴ Ibid, at p. 549.

¹⁵ Ibid, at p. 555.

d) Commentary on the St. Catherine's Milling Case

Although native title was not recognised by the JCPC in *St. Catherine's Milling*, the decision is nonetheless heralded as a landmark in Canadian indigenous rights litigation. This decision not only confirmed the existence of indigenous land rights at common law (thus dispelling the myth of benevolent or pragmatic indigenous land rights), it also left open the *possibility* of native title's existence at common law (because the Court did not explicitly *deny* native title's existence). The case itself is also notable for the unqualified recognition of native title articulated by the federal government in its arguments.

In sum, although the Ojibway (who, incidentally, were neither consulted nor represented by any party in this case) and Canada's other Indigenous Peoples did not achieve formal legal recognition of 'native title' from the JCPC in *St. Catherine's Milling*, they did achieve an important legal bench-mark – the recognition at common law of a unique form of 'land rights' claimable only by Indigenous Peoples. These 'land rights', it was determined, were created by the *Royal Proclamation of 1763* and persisted on all unceded indigenous territories as a 'burden' on the Crown's underlying or 'radical' title to all land within her sovereign jurisdiction.

ii) *The Recognition of Native Title at Common Law: Calder v. Attorney-General of British Columbia [1973]*¹⁶

The next native title case to be litigated in Canada – *Calder v. Attorney-General of British Columbia* - was brought before the Supreme Court of British Columbia in 1967 by Chief Frank Calder, acting on behalf of the Nishga (now Nisga'a) Tribal Council. The protracted time period between *St. Catherine's Milling* and *Calder* is largely attributable to the fact that a 1927 *Indian Act*¹⁷ amendment made it illegal for 'status Indians'¹⁸ to raise funds or hire legal counsel to pursue land rights or native title claims.¹⁹ Although a 1951 amendment to the *Indian Act* subsequently removed this restriction, Indigenous Peoples still faced a legal system that was "expensive, time-consuming, generally hostile to the kinds of issues that would have to be raised and rather inflexible about which kind of remedy might be awarded."²⁰ Despite these post-1951 obstacles, Chief Frank Calder

¹⁶ *Calder v Attorney-General of British Columbia* [1973] SCR 313, 7 CNLC 91 (SCC); (1970) 7 CNLC 43 (BCCA); (1969) 8 DLR (3d) 59 (BCSC).

¹⁷ The *Indian Act*, first passed by federal parliament in 1867, gave the federal Department of Indian Affairs sweeping power to invade, control and regulate all aspects of the lives of its subjects ('status Indians'), even to the point of curbing constitutional and citizenship rights. For discussion of the *Indian Act* see: J. Leslie and R. Maguire (eds.), *The Historical Development of the Indian Act* (2nd ed.; Ottawa: DIAND, 1987); Shirley Joseph, "Assimilation Tools: Then and Now", *BC Studies/Special Issue- "In Celebration of Our Survival: The First Nations of British Columbia"* (Spring) 89 (1991), pp. 65-79; and, Noel Dyck, *What is the Indian "Problem"?: Tutelage and Resistance in Canadian Indian Administration*, (St. John's: Institute of Social and Economic Research - Memorial University of Newfoundland, 1991).

¹⁸ Canada recognises three groups of 'Aboriginal Peoples': Indians ('status' and 'non-status'); Métis; and, Inuit.

¹⁹ Sec. 141 of the *Indian Act, 1927* reads as follows: "Every person who, without the consent of the Superintendent General expressed in writing, receives, obtains, solicits or requests from any Indian any payment or contribution for the purpose of raising a fund or providing money for the prosecution of any claim which the tribe or band of Indians to which such Indian belongs, or of which he is a member, has or is represented to have for the recovery of any claim or money for the benefit of the said tribe or band, shall be guilty of an offence and liable to summary conviction for each such offence to a penalty not exceeding two hundred dollars and not less than fifty dollars or to imprisonment for a term not exceeding two months."

²⁰ Roger Townshend, "Specific Claims Policy: Too Little Too Late" in *Nation to Nation: Aboriginal Sovereignty and the Future of Canada*, Diane Engelstad and John Bird (eds), (Concord: Anasi Press Ltd., 1992), p. 62. For a more detailed examination of the barriers faced by Indigenous litigants in Canada see: Murray Angus, ... "and the last shall be first": *Native Policy in and Era of Cutbacks*, (Ottawa: The Aboriginal Rights Coalition (Project North), 1990), pp. 59-62.

of the Nisga'a Nation filed suit in the Supreme Court of British Columbia in 1967 seeking a declaration confirming that:

- (1) the Nisga'a had held title to their territory prior to the assertion of British sovereignty;
- (2) this title had never been lawfully extinguished; and,
- (3) this title is a legal right.

This native title claim, which covered approximately 14 830 square kilometres of land in the Nass River Valley of north-western British Columbia, was heard by the Supreme Court of British Columbia in 1969, the British Columbia Court of Appeal in 1970, and the Supreme Court of Canada in 1972. In 1973 it ultimately resulted in one of the most influential, if divided and complex, legal decisions of the Supreme Court of Canada on the issue of native title.

a) The Arguments

In presenting his case to the court, Chief Calder argued that prior to the declaration of Crown sovereignty (1846 in the case of British Columbia) the Nisga'a had existed as a self-governing nation and had exercised effective territorial control over all lands within their government's sovereign jurisdiction (i.e. their traditional territories). In other words, Chief Calder argued that in terms of the 'ladder of social evolution' used to adjudge indigenous inhabitants during the early colonial settlement period the Nisga'a could not have been plausibly considered as either 'uncivilized' or incapable of holding judicially defensible property rights.

Chief Calder furthermore argued that the specific legal terminology used in the *Royal Proclamation of 1763* clearly demonstrated the fact that the British Crown had

recognized both the Nisga'a's status as a 'nation' ('... *the several Nations or Tribes with whom we are now connected ...*' [emphasis added]) and their legal rights to their ancestral territories ('... *should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us are reserved to them ...*' [emphasis added]). This Imperial recognition, Chief Calder's argument continued, was formally accepted by the colonial and dominion authorities of Canada, who willingly participated in the land acquisition policy set forth in the *Royal Proclamation of 1763* through the conclusion of numerous so-called 'land surrender' treaties.

Since their traditional territories had never been ceded, sold, surrendered or lost in war, Chief Calder concluded, the Nisga'a must continue to hold lawful title to their traditional territories, and therefore the general land legislation enacted by the colonial authorities of British Columbia to control and regulate their traditional territories must be considered unlawful.

The government of British Columbia countered with the argument that the *Royal Proclamation of 1763* had not been intended to apply to the land mass now known as the province of British Columbia. This legal argument rested on two main premises: (i) Vancouver Island and mainland British Columbia did not appear on most maps drawn by British cartographers (who had not yet travelled to the west coast) when the *Royal Proclamation of 1763* was issued; and (ii) the use of the present tense by the writers of the *Royal Proclamation of 1763* in the phrase "the Indians with whom we are *now* connected" (emphasis added). In sum, the colonial authorities of British Columbia argued that their colony had been considered a legal *terra nullius* ('land belonging to no

one') by the British Crown when it had asserted its sovereignty over the land mass in 1846.

This rather convoluted argument went on to assert that because the first Vancouver Island Treaty was concluded in 1850 and no further treaties were concluded after 1854, James Douglas had been acting as the Chief Factor of the Hudson's Bay Company (a position he held until 1858) and not as a colonial representative (he was Governor of the Island colony from 1851-1864 and Governor of the Mainland colony from 1858-1864) when he concluded the Vancouver Island land purchases. According to the government of British Columbia, then, the so-called 'Douglas Treaties' were not true 'treaties' (negotiated according to the terms of the *Royal Proclamation of 1763*) but rather Crown sanctioned land dealings conducted by a private company (i.e. the Hudson's Bay Company). This, it was asserted, provided additional convincing evidence that British Columbia had been considered a legal *terra nullius* by the British Crown and beyond the intended scope of the *Royal Proclamation of 1763*.

Even *if* the Nisga'a had at one time held legal rights to their traditional territories (i.e. prior to the Crown's declaration of sovereignty), the province's argument continued, these rights had been lawfully extinguished before British Columbia entered Confederation (in 1871) through either: (i) the declaration of Crown sovereignty itself (1846 in the case of British Columbia); or, (ii) competently enacted 'general land legislation' (i.e. statutory 'Land Acts' which appropriated the lands in question for public

purposes). In sum, the province of British Columbia argued that the Nisga'a Nation's claim of continuing native title was entirely devoid of legal merit.²¹

b) The Lower Court Decisions

The *Calder* case was initially heard by the Supreme Court of British Columbia²², where the Nisga'a suffered a crushing defeat at the hands of a single trial judge - Justice Gould. In his October 1968 decision, Justice Gould accepted the province's arguments that the *Royal Proclamation of 1763* did not apply to British Columbia and, therefore, determined that the pre-existing land rights (i.e. 'native title') claimed by the Nisga'a Nation either did not exist or had never been recognized in the colony of British Columbia. As a result, Justice Gould ruled that the Nisga'a Nation's claim to lawful ownership of their traditional territories was, in fact, devoid of legal merit. Justice Gould then went on to opine that that even *if* the Nisga'a had *at one time* held some kind of legal rights to their traditional territories, such rights had been 'implicitly extinguished' by general land legislation competently enacted by colonial authorities before 1871 (when British Columbia joined Confederation).

Chief Calder appealed the Gould decision to the British Columbia Court of Appeal²³, but in May 1970 a three member panel of this court unanimously upheld the lower court ruling and dismissed the appeal. According to this Court, the Nisga'a had been too 'primitive' in the nineteenth century to have held concepts of property

²¹ This argument was formally presented by the province of British Columbia in both *R v Bob & White* [1965] and *Calder v Attorney-General of British Columbia* (1969) (SCBC), [1970] (BCCA), and [1973] (SCC), and was unremittably adhered to until legal and political developments finally compelled its rejection in 1990.

²² *Calder v. Attorney General of British Columbia* (1969) 8 DLR (3d), 59-83 [SCBC].

ownership that could be considered on an evolutionary par with the concept of property ownership upheld by the common law. *If* any form of native title had *at one time* existed, this Court reasoned, it had been ‘explicitly extinguished’ by the assertion of British sovereignty and/or ‘implicitly extinguished’ by general land legislation competently enacted prior to 1871.

The only legal avenue that now remained open to Chief Calder was to appeal his Nation’s case to the Supreme Court of Canada. This move, however, was risky. Two courts had already rejected the Nisga’a Nation’s ‘native title’ claim and supporting legal arguments. A similar rejection by the Supreme Court of Canada would not only adversely affect the native title claim of the Nisga’a Nation but likely all native title claims in Canada. Recognizing this fact, some Nisga’a citizens and numerous Indigenous organizations from across the country appealed to Chief Calder not to proceed further with his legal battle. Chief Calder, however, could not be dissuaded and in November 1971 he presented his Nation’s case before a panel of seven Supreme Court justices.²⁴

c) The Decision of the Supreme Court of Canada

Reserved for 14 long months, the highly anticipated *Calder* decision was finally delivered by the Supreme Court of Canada in January of 1973. In this decision three justices held that the Nisga’a possessed native title to their traditional territories, and three justices held that they did not. All six justices, however, agreed that native title existed at common law (by virtue of Indigenous Peoples’ prior occupation of their

²³ *Calder v. Attorney General of British Columbia* [1970] 7 CNLC 43 (BCCA).

²⁴ *Calder v. Attorney General of British Columbia* [1973] 7 CNLC 91 (SCC) (also reported: [1973 SCR 313, (1973) 34 DLR (3d) 145, [1973] 4 WWR 1).

traditional territories) and that native title continued to exist until voluntarily surrendered to or validly extinguished by the Crown. The issue that divided the Court was whether or not the specific native title claimed by the Nisga'a Nation continued to exist.

The majority decision, written by Justice Judson (with Justices Richie and Martland concurring), accepted the Province of British Columbia's argument that the *Royal Proclamation of 1763* had not been intended to apply to the pre-Confederation colonies of British Columbia.²⁵ At the same time, however, this decision confirmed that native title did in fact exist at common law by virtue of Indigenous Peoples' occupation and use of their traditional territories *prior to* the declaration of Crown sovereignty. As Justice Judson's often quoted statement on the matter makes clear: "... Indian title in British Columbia cannot owe its origins to the *Proclamation of 1763*, the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefathers had done for centuries. This is what Indian title means"²⁶

Justice Judson, however, went on to describe 'native title' as "a mere burden" on the Crown's underlying (or 'radical') title to all lands within her sovereign jurisdiction²⁷ and as a right "dependent on the goodwill of the sovereign".²⁸ As a result, Justice Judson reasoned that the Crown had the exclusive right to extinguish native title, and that it had clearly exercised that right in respect of the Nisga'a Nation's traditional territories.²⁹

In the end, the decision of Justices Judson, Richie and Martland concluded that whatever native title rights the Nisga'a might have had prior to the declaration of Crown

²⁵ See: Calder, *supra* note 24, *per* Judson J, Martland and Ritchie JJ concurring, at p. 92; and, Judson J at pp. 100-101.

²⁶ *Ibid*, Judson J at p. 103.

²⁷ *Ibid*, Judson J at pp. 97-98 and 102.

²⁸ *Ibid*, Judson J at p. 103.

sovereignty over British Columbia in 1864, the absence of any Crown recognition and/or protection of those rights (i.e. through the *Royal Proclamation of 1763*) meant that such rights had already been lawfully extinguished before British Columbia entered Confederation in 1871.³⁰ According to Justice Judson's reasoning, this extinguishment had been effected through either (i) the declaration of Crown sovereignty itself³¹ (i.e. 'explicit extinguishment') or (ii) the competent enactment of Crown sanctioned general land legislation³² (i.e. 'implicit extinguishment').

The minority or dissenting decision, written by Justice Hall (with Justices Laskin and Spence concurring) concluded that the *Royal Proclamation of 1763* had in fact been intended to apply to the pre-Confederation colonies of British Columbia.³³ In the same breath, however, this decision concluded that the terms of the *Royal Proclamation of 1763* had no bearing whatsoever on the continuing existence of native title. As explained by Justice Hall: "[the proposition asserting that] after conquest or discovery the native peoples have no rights at all except those subsequently granted or recognized by the conqueror or discoverer ... is wholly wrong"³⁴ In other words, Justices Hall, Laskin and Spence concluded that native title existed whether it was formally recognized by an Imperial sovereign or not.

Although the minority decision went on to confirm the Crown's exclusive authority to extinguish native title, it did not accept the majority Justices' legal opinion on the validity of 'implicit' extinguishment. According to Justice Hall's reasoning, the

²⁹ Ibid, Judson J at pp. 106-111 and 114-115.

³⁰ Ibid, *per* Judson J, Martland and Ritchie JJ concurring at pp. 92-93; also see: Judson J at pp. 106-111 and 114-115.

³¹ Ibid, Judson J at pp. 98-99.

³² Ibid, Judson J at p. 110 and 114.

lawful extinguishment of 'native title' could only be effected through 'specific' legislation directly enacted (or explicitly sanctioned) by the Crown or through an otherwise 'clear and plain' expression of the Crown's intention to extinguish native title.³⁵ Having been presented with no proof of 'explicit' Crown intentions or instructions to extinguish the Nisga'a Nation's native title and having determined that 'implicit' extinguishment (i.e. general land legislation) was unlawful, the minority decision concluded that the Nisga'a did in fact continue to hold native title to their traditional territories.

The seventh justice on the Supreme Court panel - Justice Pigeon - rejected the Calder appeal for procedural reasons³⁶ and made no comment on the 'native title' question. As a result, the Nisga'a technically lost their case when their appeal was dismissed by a four to three majority.³⁷

d) Commentary on the Calder Decision

Contrary to popular opinion, then, the recognition of native title at common law remained tenuous following the 1973 *Calder* decision. In sum, because Chief Justice Calder's appeal was ultimately dismissed by the Supreme Court of Canada, the written decisions

³⁵ Ibid, *per* Hall J, Spence and Laskin, JJ concurring, at pp. 92-94.

³⁴ Ibid, Hall J at p. 218.

³⁵ Ibid, Hall J at pp. 210-218.

³⁶ Justice Pigeon determined that the Supreme Court of Canada had no jurisdiction to hear or determine a claim of title against the Crown in right of the province of British Columbia in the absence of a 'fiat' (or sanction) from the Lieutenant-Governor of the Province because the 'doctrine of immunity' (which shields the Crown from lawsuits against it) continues to apply in British Columbia. (This doctrine has been legislatively revoked at the federal level and in most other provinces but continues to apply in the case of British Columbia). (See: *Calder*, *supra* note 24, *per* Pigeon, J, Martland and Ritchie JJ concurring, p. 95; and, Pigeon J at pp. 223-226).

³⁷ For a critical assessment of the *Calder* decision and its implications see: Michael Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996" in *Indigenous Rights in Australia, Canada and New Zealand*, Paul Havemann (ed), (Auckland: Oxford University Press, 1999), pp. 428-446.

of the justices confirming the existence of native title at common law were, in fact, non-binding on future courts and their decisions. (As a result, in the immediate post-*Calder* period, the government of British Columbia continued to assert its historic position denying the applicability of the *Royal Proclamation of 1763* to its jurisdiction and hence, the existence of native title). In subsequent Supreme Court decisions (*R. v Guerin* [1985]; *Roberts v. Canada* [1989]; *R. v. Sparrow* [1990]; *Delgamuukw v. British Columbia* [1998]; and others³⁸), however, the Supreme Court affirmed the *Calder* justices' recognition of native title at common law, extended this recognition to include the province of British Columbia, and commenced the important process of defining the legal character of this *sui generis* common law real property right (see chapters 3-5).

iii) The Recognition of Native Title in Central Government Policy

From around the time of the conclusion of the last historic 'land surrender' treaty (1923) to the recognition of native title at common law (1973), the federal government of Canada had acted on the assumption that native title did not exist and accordingly had not seen the need for any sort of formal land claims policy. Under the existing and rather informal administrative system, 'Indian claims and grievances' were labelled as either 'petitions and complaints' or 'claims and disputes' by the federal Department of Indian

³⁸ *R v Guerin* [1985] 1 CNLR 120; *Roberts v Canada* [1989] 1 SCR 322; *R v. Sparrow* [1990] 1 SCR 1075; and, *Delgamuukw v British Columbia* [1998] 3 SCR 1010. For discussion of these and other native title cases see: Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (3rd ed.; Saskatoon: Purich Publishing, 2004), ch. 1; Dara Culhane, *The Pleasure of the Crown: Anthropology, Law and First Nations* (Burnaby: Talonbooks, 1998); David W. Elliott, "Aboriginal Title" in *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, Bradford Morse (ed), (Ottawa: Carleton University Press, 1985), pp. 48-121; and, Stan Persky, *Delgamuukw: The Supreme Court of Canada Decision on Aboriginal Title* (Vancouver: Greystone Books, 1998).

Affairs and subsequently dealt with on a rather *ad hoc* basis by the appropriate government department.

'Petitions and complaints', including outstanding indigenous land claims and objectionable government conduct (such as the institution of licensing systems to regulate hunting, trapping and fishing), were considered *a priori* as either ill-founded or minor Indian grievances that required no legal action on the part of the federal government. These were handled directly by the Department of Indian Affairs, which either dismissed them out-of-hand (as was the case for all outstanding indigenous land claims) or attempted to placate the petitioners with promises of better government administration of their affairs in the future.

'Claims and disputes', by contrast, were considered potentially legitimate Indian claims that might require legal action on the part of the government (these included allegations of unfulfilled treaty obligations and explicit violations of the *Indian Act*). These Indian claims were transferred to the Department of Justice where they were assessed on the basis of their legal merits and handled accordingly (though rarely to the satisfaction of Indigenous Peoples).³⁹

Indigenous people saw a gross conflict of interest in the federal government's exclusive authority over the classification, assessment and adjudication of their claims and had been lobbying Ottawa for years to revise the inherently biased system. In response, numerous recommendations and proposals for the establishment of an Indian Claims Commission were considered by the federal government between 1946 and 1968.

³⁹ For discussions of the handling of land claims during this early period see: Richard C. Daniel, *A History of Native Claims Processes in Canada, 1867-1979* (Ottawa: Research Branch, Department of Indian and Northern Affairs, 1980).

None of these, however, was designed to facilitate the resolution of continuing native title claims. In the long-standing opinion of the federal government, the outstanding land claims of Canada's Indigenous Peoples represented "such a bewildering and confusing array of concepts as to make it extremely difficult for either the courts of the land or the governments of the day to deal with them."⁴⁰

This position was made abundantly clear in the 1969 *Statement of the Government of Canada on Indian Policy* (commonly referred to as the '1969 White Paper'), which stated: "aboriginal claims to land ... are so general and undefined that it is not realistic to think of them as specific claims capable of remedy...."⁴¹ Even after the 1969 White Paper was withdrawn amidst fierce Indigenous opposition to its terms, however, the federal government's position on continuing native title claims remained unchanged. As (then) Prime Minister Trudeau stated when asked at an 8 August 1969 press conference whether the federal government would recognize continuing indigenous rights and title: "Our answer is no. We can't recognize aboriginal rights because no society can be built on historical 'might have beens'."⁴²

Following the release of the *Calder* decision, however,

Prime Minister Trudeau met with Frank Calder and representatives of the Nishga Tribal Council and, separately, on the same afternoon, with representatives of the Union of BC Indian Chiefs and the National Indian Brotherhood. The Prime Minister described the Supreme Court judgment as meaning that 'perhaps' the Indians had more 'legal rights' than he had thought when his government had prepared its policy statement in 1969.

⁴⁰ Canada, Indian and Northern Affairs Canada, *In All Fairness: A Native Claims Policy, Comprehensive Claims* (Ottawa: Queen's Printer, 1981) as quoted in Patricia Sawchuk, "Policy: In All Fairness – A Native Claims Policy", *Canadian Journal of Native Studies*, 2:1 (1982), pp. 171-172.

⁴¹ Canada, Department of Indian Affairs and Northern Development (1969).

⁴² Culhane (1998), p. 83.

He still refused to use the term 'Aboriginal title' or 'Aboriginal rights'.
He advised the Indians to speak of 'legal rights'.⁴³

Although the exact content of these 'legal rights' remained largely undefined in 1973, the Supreme Court's purported confirmation of their existence in *Calder* was enough to compel the federal government to reconsider the merits of its existing land claims policy.

As a result, in a landmark statement issued on 8 August 1973 the federal government publicly announced that it "was prepared to negotiate comprehensive land claims with Aboriginal groups where their traditional and continuing interest in the lands concerned could be established."⁴⁴ As explained by (then) Indian Affairs Minister, Jean Chrétien:

These claims [i.e. comprehensive land claims] come from groups of Indian people who have not entered into Treaty relationships with the Crown. They find their basis in what is variously described as "Indian Title",

⁴³ Douglas Sanders, "The Nisgha Case", in *The Recognition of Aboriginal Rights: Case Studies 1, 1996*, Samuel W. Corrigan and Joe Sawchuk (eds) (Brandon: Bearpaw Publishing, 1996), p. 94.

⁴⁴ As quoted in Assembly of First Nations, "Backgrounder: Highlights from the *AFN Legal Review of Canada's Comprehensive Land Claims Policy*" (Ottawa: Assembly of First Nations, 2002). At the same time the federal government also reaffirmed its long standing position that lawful obligations to Indigenous people must be met and announced that a new claims policy would be implemented to address grievances related to such lawful obligations. According to this policy, "the Government would continue to deal with grievances that Indian people might have about the Government's administration of Indian lands and other asserts under the various Indian Acts and Regulations, and those claims that might exist with regard to the actual fulfilment or interpretation of the Indian Treaties or Agreements and Proclamations affecting Indians and reserve lands. Claims based on those grievances were described in the policy statement as 'specific claims'." [Canada, Indian and Northern Affairs – Office of Native Claims, *Native Claims: Policy, Processes and Perspectives*, opinion paper prepared for the Second National Workshop of the Canadian Arctic Resources Committee – Edmonton, AB, 20-22 February 1978 (Ottawa: Minister of Supply and Services, 1978), p. 3].

According to the Government of Canada, "Specific Claims relate to the fulfilment of treaties and to the federal government's administration of Indian reserve lands, band funds and other asserts. The government's primary objective with respect to specific claims is to discharge its lawful obligations to Indian bands. Treaty Land Entitlement (TLE) is a large category of claims which relate primarily to a group of treaties that were signed with Indian bands, mainly in the prairie provinces. Not all bands received the full amount of land promised. Claims from bands for outstanding entitlements are categorized as TLE claims and are handled separately from the other specific claims." [Canada, Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims*, (Ottawa: Minister of Public Works and Government Services Canada, 1993;reprinted 1998), p. iii.]

Given the absence of historic treaties and other agreement that might give rise to lawful obligations in the Australian case, however, the specific claims policy has not be included in this comparative study of native title's legal and political accommodation in Canada and Australia.

“Aboriginal Title”, “Original Title”, “Native Title”, or “Usufructuary Rights”. In essence, these claims relate to the loss of traditional use and occupancy of lands in certain parts of Canada where Indian title was never extinguished by treaty or superseded by law ... It is basic to the position of the Government that these claims must be settled and that the most promising avenue to settlement is through negotiation.⁴⁵

Under the auspices of the federal government’s new *comprehensive claims policy*, Indigenous Peoples were encouraged to forgo costly and uncertain litigated settlements of their continuing native title claims in favour of equitably negotiated final settlement agreements (also termed ‘modern treaties’).

To facilitate the implementation of this new policy, the federal government established an *Office of Native Claims* within the Department of Indian Affairs in July 1974. This Office was subsequently flooded with an overwhelming number of outstanding indigenous land claims (now termed ‘comprehensive claims’), which, up until 1973, had not been accepted as legitimate or credible claims by the federal government. As a result, the federal government announced in 1976 that it would negotiate only six comprehensive claims (and only one comprehensive claim per province) at any given time. This announcement came on the heels of Canada’s first comprehensive claims settlement agreement, which demonstrated to the federal government just how detailed modern treaties needed to be in order to effectively resolve the issue of continuing native title.

⁴⁵ Policy statement made by Minister of Indian Affairs, Jean Crétien, 8 August 1973. Retrieved from: www.ubcic.bc.ca/landquestion.htm (4 January 2002).

a) *The James Bay and Northern Quebec Agreement, 1975*

The first indigenous land claims settlement, or modern treaty, to be concluded in Canada was precipitated by the construction of a huge hydro-electric project in Northern Quebec. This project involved the blocking of several rivers in the James Bay/Ungava region of Northern Quebec, which was to result in the flooding of vast wilderness areas where Cree and Inuit Peoples had engaged in hunting and trapping since time immemorial. Concerned about the destruction of their traditional territories and the Quebec government's blatant disregard for their continuing native title rights, the Cree and Inuit Peoples of Northern Quebec asked the Superior Court of Quebec for an interlocutory injunction to stop all work on the hydro-electric project until a resolution of their outstanding land claims could be concluded (*Kanatewat vs. James Bay Development Corporation* [1974]⁴⁶).

Although the *Calder* decision had confirmed native title as a judicially defensible common law real property right, the Superior Court of Quebec was the first Canadian Court to apply this decision to an outstanding indigenous land claim. The resulting November 1973 decision in favour of the Cree and Inuit was thus the first Canadian legal decision to confirm the practical existence of native title in respect of a specific tract of land, to offer a legal opinion on the content of this right, and, to affirm that native title can take precedence over other legal rights (namely, a provincial government's right to manage and control Crown lands).

⁴⁶ *Kanatewat vs. James Bay Development Corporation* [1974] RP 38.

In sum, the Superior Court of Quebec's 1973 decision in *Kanatewat vs James Bay Development Corporation*⁴⁷ confirmed that the Cree and Inuit Peoples of Northern Quebec did in fact hold native title to the region in question. It also confirmed that the Cree and Inuit Peoples of Northern Quebec had unique 'aboriginal rights' to the natural resources attached to their traditional territories. And finally, it determined that the government of Quebec had an unfulfilled legal obligation under the *Quebec Boundaries Extension Act* (which transferred the region at issue to the province in 1912⁴⁸) to resolve outstanding indigenous land claims before undertaking either settlement or development in the vast unceded regions of the province.⁴⁹

This Superior Court of Quebec decision was immediately appealed by the Government of Quebec and subsequently overturned by the Quebec Court of Appeal several days later.⁵⁰ Rather than addressing the issue of continuing native title, however, the Quebec Court of Appeal employed the 'balance of inconvenience argument' and "held that the interests of six thousand people should not take precedence over those of the six million Québécois, an argument that the lawyer for the defence, James O'Reilly, termed a case of 'might makes right' or 'the majority always rules'."⁵¹

⁴⁷ Ibid.

⁴⁸ "In 1912, The Quebec Boundaries Extension Act transferred the area north of the Eastmain River from the Northwest Territories to the jurisdiction of Quebec, with the proviso that the Quebec government recognize the rights of native people in this territory and *obtain surrenders of such rights in the same manner as the Government of Canada has heretofore recognized such rights and has obtained surrender thereof*" (emphasis original) [Canada, Office of Native Claims, *Native Claims: Policy, Process and Perspectives* (Ottawa: Indian and Northern Affairs, 1978), p. 7].

⁴⁹ See: *Kanatewat*, *supra* note 46.

⁵⁰ *James Bay Development Corporation v. Kanatewat* [1974] 8 CNLC 188 (Quebec Sup Ct).

⁵¹ Toby Morantz, "Aboriginal Land Claims in Quebec" in *Aboriginal Land Claims in Canada: A Regional Perspective*, Ken Coates (ed) (Toronto: Copp Clark Pitman Ltd., 1992), p. 112.

Although a further appeal by the Cree and Inuit to the Supreme Court of Canada was ultimately dismissed⁵², the governments of Canada and Quebec agreed to enter into comprehensive land claims negotiations with the Cree and Inuit Peoples of Northern Quebec rather than gamble on the uncertain outcome of impending native title litigation.

As Toby Morantz explains,

[although the Supreme Court of Canada] did not find the Quebec Court of Appeal's decision judicially faulty, ... two dissenting judges expressed the opinion that there were material issues involved which warranted a full hearing before their court. The Quebec government could not take the chance that the James Bay natives would make their way through all the layers of the justice system and end with their rights ultimately being recognized by the Supreme Court. Only eleven month earlier the Supreme Court had handed down its judgment in the Calder Case, in which the Nisga'a's unextinguished aboriginal rights were recognized by three of the judges but not recognized by another three. The seventh judge hearing the case rejected the claim on a technical issue. Thus the possibility that the Cree and the Inuit could win forced the provincial government to begin negotiations in earnest.⁵³

One year of intensive negotiations later, on 11 November 1975, the *James Bay and Northern Quebec Agreement* was formally concluded, its provisions coming into effect two years later after enabling legislation was passed by the legislatures of Canada and Quebec.⁵⁴ Negotiated in the wake of the Supreme Court of Canada's recognition of

⁵² *Kanatewat v. James Bay Development Corporation* [1975] 1 SCR 48.

⁵³ Morantz (1992), p. 112. It is interesting to note that although the federal government was asked to intervene on behalf of the Cree and Inuit of James Bay, it chose not to do so, presumably for political reasons. As Morantz (1992): "In Quebec at the time, 'separatism' sentiments were running quite high and the federal government did not wish to be seen as interfering in provincial affairs. According to Harvey Feit, an anthropologist and consultant to the Cree in the court case and subsequent negotiations, the federal government adopted a position of 'alert neutrality'. This position was a great disappointment to the Cree, who had until then considered the government of Canada as a 'benevolent protector'. Instead of intervening, the Canadian government made substantial interest-free loans and grants to the Cree and Inuit." (pp. 112-113).

⁵⁴ Although the historic treaties became effective upon their approval by the Crown (or, in the case of the post-Confederation treaties, upon their approval by Cabinet), modern practice requires Final Settlement Agreements (i.e. 'modern treaties') to be formally approved by all relevant government legislatures (see chapters 6 and 7).

native title as an existing common law right to land and the Superior Court of Quebec's assumedly influential (if not precedent setting) opinion that native title includes a right to natural resources, the negotiated terms of Canada's first comprehensive land claims settlement (or modern treaty) provided the Cree and Inuit Peoples of Northern Quebec with: over 1,165,286 square kilometres of land; \$225 million in cash compensation for lost lands and resources (to be paid over 20 years); exclusive hunting and trapping rights over 150 000 square kilometres of settlement lands; participation in an environmental and social protection regime; and, an income security program for hunters and trappers. It also made provisions for the Cree and Inuit Peoples to establish new systems of local government on lands set aside for their use and to establish Indigenous-controlled education and health authorities for the benefit of their Peoples. Other terms of the agreement included: a series of special measures related to policing and the administration of justice on Cree and Inuit owned lands; provisions for continuing federal and provincial benefits to Cree and Inuit people living in the settlement area; and, the creation of special social and economic development strategies to help meet the long-term needs and aspiration of the Cree and Inuit Peoples.

In exchange for this Final Settlement Agreement, the Cree and Inuit Peoples of Northern Québec agreed to “cede, release, surrender and convey all their Native claims, rights, title and interests, whatever they may be.”⁵⁵

⁵⁵ Canada, Québec, Bureau de l'Éditeur Officiel, *James Bay and Northern Quebec Agreement: agreement between the government of Quebec, the Société d'énergie de la Baie James, the Société de développement de la Baie James, the Commission hydroélectrique du Québec (Hydro-Québec) and the Grand Council of the Crees (of Quebec), the Northern Quebec Inuit Association and the Government of Canada* (1976), section 2.1. For additional information on the *James Bay and Northern Quebec Agreement, 1976* please see: Boyce Richardson and Sally M. Weaver, *James Bay: The Plot to Drown the North Woods* (San Francisco: Sierra Club in association with Clarke, Irwin, Toronto, 1972); Canadian Association in Support of the Native Peoples, *A Brief Guide to the James Bay Controversy: Save James Bay* (1973); J. A. Spence

b) *Understanding the Federal Government's Comprehensive Claims Policy*

Introduced in August 1973, only seven months after the landmark Supreme Court ruling in *Calder*, the federal government's 'comprehensive claims policy' attracted numerous claims of continuing native title in its first few years of operation. As of 1980, however, only two Final Settlement Agreements has been concluded under its auspices – the *James Bay and Northern Quebec Agreement, 1975* (discussed above), and the supplementary *Northeastern Quebec Agreement, 1978* (which amended the *James Bay and Northern Quebec Agreement* to integrate the Naskapi People of the same region). As a result, the federal government launched a review of its comprehensive claims policy in 1981. This review resulted in the 16 December 1981 publication of *In All Fairness: A Native Claims Policy, Comprehensive Claims*⁵⁶, the first formal and public statement of the federal government on its policy for the resolution of outstanding native title claims.

In *In All Fairness*, the federal government stated that the three major objectives of its comprehensive claims policy were:

1. To respond to the call for recognition of Native land rights [sic] by negotiating fair and equitable settlements;
2. To ensure that settlement of these claims will allow Native people to live in the way they wish; and

(for the James Bay Task Force of the Indians of Quebec Association and Northern Quebec Inuit Association), *Not by Bread Alone*, James Bay Task Force, No. 2, (1972); Boyce Richardson and Sally M. Weaver, *Strangers Devour the Land: The Cree Hunters of the James Bay Area versus Premier Bourassa and the James Bay Development Corporation* (Toronto: Macmillan of Canada, 1975); Canada, Department of Indian Affairs and Northern Development, James Bay Development Project, *James Bay Agreement – Role of the Federal Government and Chronology of Events* (1977); Harvey Fiet, "Negotiating Recognition of Aboriginal Rights: History, Strategies and Reactions to the James Bay and Northern Quebec Agreement", *Canadian Journal of Anthropology* 2 (1980), pp. 159-172; Sylvie Vincent and Garry Bowers (eds), *Baie James et Nord Québécois: Dix Ans Après* (Montreal: Recherches amérindiennes au Québec, 1988); Sean McCutcheon, *Electric Rivers: The Story of the James Bay Project* (Montreal: Black Rose Books, 1991); Boyce Richards, *Strangers Devour the Land* (Vancouver: Douglas & McIntyre, 1991); and, Alain Gagnon and Guy Rocher, *Reflections on the James Bay and Northern Quebec Agreement* (Montreal: Québec Amérique, 2002).

⁵⁶ Canada, Indian and Northern Affairs Canada (INAC), *In All Fairness: A Native Claims Policy, Comprehensive Claims*, (Ottawa: Queen's Printer, 1981).

3. [To provide] [t]hat the terms of settlement of these claims will respect the rights of all other people.⁵⁷

This publication went on to explain the general operating principles of the federal government's comprehensive claims policy (as followed since 1973) and to confirm the federal government's intentions to continue to adhere to these general operating principles in the future. As explained in *In All Fairness*:

The present policy statement is meant to elaborate the Government of Canada's commitment to the Native people of Canada in the resolution of [comprehensive] claims ... By negotiating comprehensive land claims settlements with Native people, the government intends that all aspects of aboriginal rights are addressed on a local and regional basis. These aspects run the gamut of hunting, fishing and trapping, which are as much cultural as economic activities, to those more personal and communal ways of expression such as arts, crafts, language and customs. They also include provisions for meaningful participation in contemporary society and development on Native lands ... It is intended that these settlements will be much in the way of helping to protect and promote Indian and Inuit peoples' sense of identity. This identity goes far beyond the basic human needs of food, clothing and shelter. The Canadian government wishes to see its original people obtain satisfaction and from this blossom socially, culturally and economically.⁵⁸

In considering "the essential factors necessary for the achievement of comprehensive claims settlements", the following 'basic guidelines' were identified:

When a land claim is accepted for negotiation, the government requires that the negotiation process and settlement formula be thorough so that the claim cannot arise again in the future. In other words, any land claims settlement will be final. The negotiations are designed to deal with non-political matters arising from the notion of aboriginal land rights [sic] such as, land, cash compensation, wildlife rights, and may include self-government on a local basis.

⁵⁷ Ibid, p. 7.

⁵⁸ Ibid.

The thrust of this policy is to exchange undefined aboriginal land rights [sic] for concrete rights and benefits. The settlement legislation will guarantee these rights and benefits.⁵⁹

In sum, the comprehensive claims policy was designed to reconcile the unlawful dispossession of traditional Indigenous territories with the historic recognition of Indigenous Peoples as lawful land owners and the contemporary recognition/confirmation of native title at common law.

In order to effect the full and final settlement of outstanding indigenous land claims (i.e. justiciable claims to traditional Indigenous territories and their related resources), final settlement agreements were envisioned to include a ‘comprehensive’ range of legislated rights, benefits and entitlements (flowing from judicially defensible native title). Revised in 1985 and again in 1995 in response to a series of important legal and political developments (including: the recognition of ‘existing aboriginal and treaty rights’ in s. 35 of the *Constitution Act, 1982* [see below]; substantial judicial commentary on the nature and scope of aboriginal rights to lands, resources and treaty entitlements as well as the lawful obligations these rights impose on Canadian governments [see chapters 3 and 4]; and, increasing recognition of Indigenous Peoples’ inherent right of self-government), the range of issues currently amenable to negotiation under the auspices of the federal government’s comprehensive claims policy includes:

- full ownership of (i.e. ‘ordinary’ common law title to) defined tracts of land in the area covered by the Final Settlement Agreement;
- guaranteed wildlife harvesting rights in defined areas covered by the Final Settlement Agreement;
- guaranteed subsurface rights in defined areas covered by the Final Settlement Agreement;

⁵⁹ Ibid, p. 19.

- guaranteed participation in land, water, and wildlife management throughout the settlement area;
- a role in the management of heritage resources and parks in the settlement area;
- financial compensation (for lost lands and resources);
- resource revenue-sharing arrangements;
- specific measures to stimulate economic growth and development;
- corporate structures to provide for the protection and enhancement of settlement assets;
- local or municipal-styled administrative rights (where appropriate); and,
- constitutionally entrenched aboriginal self-government provisions (where all parties agree).⁶⁰

The resulting Final Settlement Agreements, or modern treaties, it was hoped, would not only effect the full and final resolution of outstanding Indigenous land claims, but also facilitate the economic growth and self-sufficiency of indigenous land claimants in the future. As explained in the federal government's most recent comprehensive claims policy statement:

The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title. Uncertainty with respect to the legal status of lands and resources, which has been created by a lack of political agreement with Aboriginal groups, is a barrier to the economic development for all Canadians and has hindered the full participation of Aboriginal peoples in land and resource management. The comprehensive claims process is intended to lead to agreement on the specific rights Aboriginal peoples will have in the future with respect to lands and resources. It is not an attempt to define what rights they may have had in the past.⁶¹

⁶⁰ See: INAC (1981), pp. 23-24; Canada, Indian Affairs and Northern Development, *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services, 1987), pp. 11-18; Canada, Indian and Northern Affairs, *Federal Policy for the Settlement of Native Claims* (Ottawa: Minister of Public Works and Government Services Canada, 1993; reprinted 1998), pp. 7-11; and, Canada, Indian Affairs and Northern Development, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Indian Affairs and Northern Development, 1995).

⁶¹ Canada, Indian and Northern Affairs, (1993; rp 1998), p. 5.

In sum, negotiated comprehensive claims settlements are envisioned to provide for the exchange of undefined aboriginal rights (including native title) over an area of traditional use and continuing occupancy for a clearly defined package of rights and benefits codified in a legislated Final Settlement Agreement. The objective is to negotiate modern treaties that provide a clear, certain and long-lasting definition of rights to land and resources.

c) Evaluating the Comprehensive Claims Policy

As of February 2004, sixteen comprehensive claims agreements have been concluded under the auspices of the federal government's comprehensive claims policy. This is not an unremarkable accomplishment considering the complexity of comprehensive claims negotiations, the requirement of provincial, territorial and third party involvement, and the fact that until 1990 the federal government limited the number of negotiations that could be undertaken at any one time to six.⁶² Canada's comprehensive claims policy, however, is not uncontested. Since its introduction in 1973, this policy has been criticized by virtually all Indigenous people in Canada. Central to this criticism are the issue of extinguishment and self-government.

According to the federal government's original 1973 comprehensive claims policy, the resolution of outstanding indigenous land claims required the cession and surrender (i.e. extinguishment) of all present and future native title claims in exchange for ordinary common law land rights (usually in the form of title in fee simple) to delineated settlement and/or non-reserved areas. This aspect of the policy was completely

unacceptable to many Indigenous Peoples who balked at the idea that the judicially defensible rights they had held since time immemorial could be negotiated out of existence to satisfy the self-serving interests of Canadian governments and/or non-indigenous people.

In response, the comprehensive claims policy was slightly amended in 1986 to allow for the retention of 'aboriginal rights' on lands which Indigenous Peoples will hold following the conclusion of final settlement agreements. As was explained earlier, however, these rights are only available in delineated 'settlement areas' and only to the extent that they are not inconsistent with the terms of the final settlement agreements themselves. In other words, since 1986 'aboriginal rights' (including native title⁶³) technically continue to exist following the conclusion of comprehensive claims settlements, but only to the extent that they have been practically (and definitively) defined by the terms of final settlement agreements themselves. According to Indigenous people, however, this so-called 'modified rights' approach effects little real change in the federal government's comprehensive claims policy. Rather than relying on the judicial recognition and confirmation of their legal rights to lands and resources, Indigenous Peoples must still accept that Canadian governments will only respect their legal rights once these are fully and finally circumscribed by the terms of a legislated final settlement agreement.

⁶² Canada, Department of Indian Affairs and Northern Development (DIAND), "Comprehensive claims Policy and Status of Claims" (February) 2003, available at: www.ainc-inac.gc.ca/ps/clm/brief_t_e.html.

⁶³ In Canada the terms 'Indian rights' and 'Indian title'; 'aboriginal rights' and 'aboriginal title'; and, 'native rights' and 'native title' are frequently used interchangeably. This will inevitably change following Chief Justice Lamer's position in *R. v. Adams* [1996], reiterated in *Delgamuukw v. British Columbia* [1998], that 'native title' is 'simply one manifestation of a broader-based conception of aboriginal rights'.

A further objection to the comprehensive claims policy submitted by Indigenous people is that it forces Indigenous land claimants to abandon their sovereign status as distinct ‘nations’ with ‘inherent’ rights of self-government in order to secure a limited degree of ‘legislated’ governing authority defined in modern treaty settlements. Although the federal government formally recognized Indigenous Peoples’ ‘inherent’ right to self-government in the early 1990s and claims to respect this right in current modern treaty negotiations⁶⁴, the fact remains that aboriginal self-government is considered a ‘topic’ for negotiation by the federal government and not a legal right. Rather than recognize Indigenous land claimants’ ‘inherent’ right of self-government in comprehensive claims negotiations, the federal government requires the nature and scope of aboriginal governments to be definitively defined by (and limited to) the terms of final settlement agreements. In other words, the comprehensive claims policy forces Indigenous Peoples to exchange their *inherent* right of self-government for a ‘limited and delegated’ form of self-government, much as it requires Indigenous Peoples to exchange their *legal* rights to lands and resources for ‘legislatively defined’ modern treaty rights.

These and other serious problems with Canada’s comprehensive claims policy will be discussed at greater length in chapters 6 and 7. For the moment, however, it suffices to note that, compared to Australia’s limited and politically insecure recognition of native title in policy (discussed below and in chapters 6 and 7), Canada’s

⁶⁴ In 1995, the federal government introduced its “Inherent Right Policy” and announced that self-government agreements could, henceforward, be negotiated simultaneously with land and resources as part of comprehensive claims agreements. At the same time, the federal government also announced that it was prepared (where the other parties agreed) to constitutionally protect certain aspects of self-government agreements as ‘treaty rights’ within the meaning of section 35(1) of the *Constitution Act, 1982*.

comprehensive claims policy gives explicit political recognition to the existence of native title and is, at least at present, politically secure.

To explain this last point further, although the Canadian government's comprehensive claims policy is just that – a policy and not law – in *Gathering Strength - Canada's Aboriginal Action Plan* (announced on 7 January 1998 in response to the *Royal Commission on Aboriginal Peoples*, 1991-1996) the Government of Canada re-affirmed its position that “treaties, both historic and modern, will continue to be a key basis for the future relationships between Aboriginal people and the Crown.”⁶⁵ This assertion, coupled with Canada's relatively long history of recognizing native title and courts' more recent reiteration of native title's continued existence, make it extremely unlikely that this policy will be revoked (or unfavourably altered to the detriment of the Indigenous Peoples of Canada), at least in the foreseeable future.⁶⁶

Of central relevance to the security of native title's political recognition is the fact that as 'modern treaties', comprehensive claims settlements are protected by s. 35(1) and (3) of the *Constitution Act, 1982* (discussed below). This gives negotiated settlement agreements, including their confirmation of land and resource rights, a virtually immovable grounding in Canadian law and policy.

⁶⁵ Canada, DIAND (2003).

⁶⁶ This statement is supported by public opinion research which has consistently demonstrated strong popular support for the negotiated settlement of continuing native title claims. See for example: Native Council of Canada, *Pilot Study of Canadian Public Perceptions and Attitudes Concerning Aboriginal Rights and Land Claims* (Cutler: Native Council of Canada, 1976); J. Rick Ponting, *Profiles of Public Opinion on Canadian Natives and Native Issues: Module 5 – Land, Land Claims, and Treaties* (Calgary: University of Calgary - Research Unit for Public Policy Studies (Faculty of Social Sciences), 1988); and, J.

iv) Native Title's Recognition in Statute Law

There is not now, nor has there ever been, any general legislation of the Parliament of Canada that expressly recognises or affirms native title.⁶⁷ According to David Elliott, however, "there are a great number of enactments which arguably are consistent with the existence of such a title. Among these are the Manitoba Act of 1870, the Dominion Lands Act from 1872 to 1908, and the Ontario and Quebec Boundaries Extensions Acts of 1912"⁶⁸, all of which recognize Indigenous Peoples' continuing rights to unceded Crown lands.

Since 1982, however, native title has been recognised in and given protection by s. 35(1) of the *Constitution Act, 1982*, which states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed". This section was subsequently amended, in 1983, to include a new subsection (3), which states: "For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired". According to Fleras and Elliott, s. 35 of the *Constitution Act, 1982* makes Canada "the only country in the world in which constitutionally entrenched aboriginal and treaty rights serve as the basis for framing aboriginal-state relations."⁶⁹

Prior to 1997, however, legal uncertainty surrounded the inclusion of native title in the phrase 'existing aboriginal and treaty rights'. In the Supreme Court of Canada's decision in *Delgamuukw v. British Columbia* [1998], however, this uncertainty was

Rick Ponting, "Public Opinion on Canadian Aboriginal Issues, 1976-1998: Persistence, Change and Cohort Analysis", *Canadian Ethnic Studies* 32:3 (2000), pp. 44-74.

⁶⁷ David Elliott, "Aboriginal Title" in *Aboriginal Peoples and the Law: Indian, Métis and Inuit Rights in Canada*, Bradford Morse (ed), (Ottawa: Carleton University Press, 1985), p.84.

⁶⁸ Ibid.

dispelled. “Aboriginal title is a right to the land itself”, the Supreme Court ruling stated, and this right is protected by s. 35(1) of the Canadian Constitution.⁷⁰ Since 1982, then, native title has been recognized as a constitutionally protected ‘aboriginal right’ to land. This recognition is not only legally and politically novel (i.e. native title is the only property right to be specifically recognized in and protected by Canada’s Constitution) it is also legally and politically significant, as will now be explained.

Before its entrenchment in s.35(1) of the *Constitution Act, 1982*, native title, as a common law right, was weaker than the prerogative rights of the Crown and, later, the rights of the British and Canadian Parliaments. As a result, the legitimate expression of native title could not survive in the face of conflicting legislation passed by the appropriate body.⁷¹ Since the adoption of s. 35(1) of the *Constitution Act, 1982*, however, the extinguishment of native title without the consent of Indigenous Peoples is no longer possible in Canadian law. In sum, with the creation of s. 35(1) and its entrenchment in the Constitution, ‘aboriginal rights’ (including native title) were transformed from justiciable common law rights into justiciable constitutional rights, and a new set of premises for their legal and political accommodation became available⁷² (see Chapter 4 for further discussion of this point).

⁶⁹ Augie Fleras and Jean Leonard Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand* (Toronto: Oxford University Press, 1992), p.8.

⁷⁰ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010, per Lamer CJ and Cory, McLachlin and Major JJ, p. 31.

⁷¹ Michael Asch and Norman Zlotkin, “Affirming Aboriginal Title: A New Basis for Comprehensive Claims Negotiations”, in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equality and Respect for Difference*, Michael Asch (ed.), (Vancouver: UBC Press, 1997), p. 23.

⁷² Michael Asch, “From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973-1996”, in *Indigenous Rights in Australia, Canada and New Zealand*, Paul Havemann (ed.), (Auckland: Oxford University Press, 1999), p. 434.

v) ***Commentary on the Legal and Political Recognition of Native Title in the Canadian Case***

Confirming Indigenous Peoples' status as the lawful owners of their unsurrendered traditional territories, the Supreme Court's recognition of native title at common law, the federal government's recognition of native title in central government policy, and the Supreme Court's recognition of native's title in the terms of section 35(1) and (3) of the *Constitution Act, 1982* are all substantially consistent with Canada's initial and historically contingent recognition of indigenous rights to land. Rather than representing a 'key breakpoint in history' from which a 'reactive' path dependent sequence followed, then, the recognition of native title at common law is more appropriately characterized as an unanticipated event that temporarily disrupted (but ultimately did not significantly alter) the self-reinforcing path dependent sequence of recognition initiated during Canada's early colonial settlement period.

In sum, although the existence of native title was not proactively affirmed by Canadian governments between 1923 (when the last historic 'land surrender' treaty was concluded) and 1973 (when the federal government introduced its comprehensive claims policy), its contemporary recognition is intimately tied to and logically flows from the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners (rather than being predicated upon novel and/or revisionary ideas about indigenous rights to land). Simply stated, the recognition of native title at common law and in central government policy reaffirmed (rather than significantly altered) Canada's original recognition of indigenous rights to land.

To explain point further, if the recognition of native title at common law were truly a ‘key breakpoint in history’ one would not expect the landmark court decision in question – *Calder* – to reference the early accommodation of native title in policy (i.e. through the terms of the *Royal Proclamation of 1763*) and practice (i.e. through the conclusion of historic ‘land surrender’ treaties) in its judicial reasoning, nor would one expect the political developments that followed the recognition of native title at common law – the development of a comprehensive claims policy and the recognition of ‘existing aboriginal and treaty rights’ in section 35 of the *Constitution Act, 1982* – to mirror the indigenous land acquisition regime that existed prior to native title’s common law recognition (i.e. the historic treaty process) and to reaffirm the unextinguished and previously confirmed rights of Indigenous people (i.e. ‘existing aboriginal and treaty rights’).

As was explained in the Introduction to the study, whereas ‘reactive’ path dependent sequences are marked by backlash processes that *transform* and perhaps *reverse* early events, ‘self-reinforcing’ path dependent sequences are characterised by processes of reproduction that *reinforce* early events.⁷³ As this chapter has begun to illustrate (and as subsequent chapters will illustrate in more detail), the recognition of native title at common law did not ‘transform’ the legal and political accommodation of indigenous rights to land; it simply provoked a re-articulation of the pre-existing accommodation regime (i.e. that accommodation regime that was initiated during the early years of colonial settlement).

⁷³ James Mahoney, “Path Dependence in Historical Sociology”, *Theory and Society* 29:4 (2000), p. 526; and, “Introduction” [to this study], p. 11.

As will now be explained, the concept of native title enjoys a much lesser degree of recognition in law and policy in the Australian case than it does in the Canadian case. Mirroring the Canadian case, however, the degree of recognition that native title has been afforded by (post-)colonial legal and political institutions is intimately tied to and flows logically from Australia's initial and historically contingent recognition and accommodation of indigenous rights to land.

II - THE LEGAL AND POLITICAL RECOGNITION OF NATIVE TITLE IN AUSTRALIA

By the mid-20th century it was a generally held assumption that native title was not part of the Australian common law. Land grants to settlers covered most of the vast continent and were founded upon the judicially accepted notion that, upon the 'discovery' of Australia, title to all land was vested in the sovereign Crown. As McRae, Nettheim and Beacroft explain:

Australian Aborigines, whilst having a uniquely close relationship with the land, are also unique among the indigenous inhabitants of countries colonised by Britain in being the most completely dispossessed of their land and the least successful in asserting rights at common law based on their former occupation of that land.

In most former British colonies [like Canada, for example] the law was instrumental in dispossessing the indigenous peoples of ownership of land, but it also provided some degree of protection (admittedly, hopelessly inadequate compared to what it took) by means of treaties, legislation, and limited recognition of common law rights ... [In Australia, however,] Aborigines have been denied common law land rights based on the recognition that indigenous people enjoy certain land rights based on their occupancy prior to the acquisition of sovereignty by the colonising power.⁷⁴

⁷⁴ H. McRae, G. Nettheim and B. Beacroft, *Aboriginal Legal Issues* (Sydney: The Law Book Company Ltd., 1991), p. 101.

As was asserted by the New South Wales Supreme Court in an early property dispute between the Crown and a white settler (*Attorney-General v Brown* (1847)⁷⁵): all the waste and unoccupied land of the colony belongs to the Crown “for, at any rate, there is no *other* proprietor of such land”⁷⁶ (emphasis original); and as was asserted by the Judicial Committee of the Privy Council in a later colonial property dispute (*Cooper v Stuart* (1889)⁷⁷): when New South Wales was “peacefully annexed to the British dominions” it was “a tract of territory practically unoccupied, without settled inhabitants or settled law.”⁷⁸ As Henry Reynolds explains: “The truly amazing achievement of Australian jurisprudence was to deny that Aborigines were ever in possession of their own land, robbing them of the great legal strength of that position.”⁷⁹ In fact, it was not until 1970 that an Australian court was called upon to consider the issue of native title directly.

i) Milirrpum v. Nabalco Pty. Ltd. and the Commonwealth of Australia (1971)⁸⁰

The first native title action in Australia was initiated by Indigenous leaders representing the 11 clans comprising the Yirrkala (or Yolngu) People (a group of about 500 Indigenous people from Yirrkala, which is situated on the Gove Peninsula of the Northern Territory). Commonly referred to as ‘the Gove Land Rights Case’ or simply ‘the Gove case’, the developments leading up to this action have been succinctly summarized by McRae, Nettheim and Beacroft as follows:

⁷⁵ *Attorney-General v Brown* (1847) 1 SCR (NSW) (App.) 30.

⁷⁶ *Ibid*, at p. 35.

⁷⁷ *Cooper v Stuart* (1889) 14 App. Cas. 286.

⁷⁸ *Ibid*, at pp. 291-292.

⁷⁹ Henry Reynolds, *The Law of the Land* (Ringwood: Penguin, 1987), p. 2.

Since 1886 [the Yirrkala's] traditional land had been alienated in the form of pastoral leases though its desolate character made it unsuitable for intensive use. The land became part of the Arnhem Land reserve during the 1930s and a Methodist mission was established. Bauxite was discovered in 1953. The federal government granted mining leases without consulting the Yirrkala people, and great concern was aroused by the bulldozing of sacred sites.

In 1963 the Yirrkala people presented their famous bark petition to the House of Representatives. The text, in one of the local languages, complained of the lack of consultation, stated that sacred sites were threatened, and called for a committee of inquiry. [In response] [t]he *Report from the Select Committee on Grievances of Yirrkala Aborigines, Arnhem Land Reserve* was produced but no action was taken on the report ...

In 1968, again without consulting the Yirrkala people and without making any provision for compensation, the federal government passed the *Mining (Gove Peninsula Nabalco Agreement) Act 1968 (NT)*. This statute granted a 42 year lease to the Swiss/Australian mining consortium Nabalco to mine bauxite. The agreement also provided for the creation of a township for the mine workers which would bring liquor and other disruptions to the Yirrkala peoples' way of life, as well as further destruction of the land itself.⁸¹

In response to the Commonwealth Government's consistent refusal to take its grievances seriously, the Yirrkala People initiated proceedings in the Northern Territory Supreme Court in 1969 seeking declarations that confirming that: (i) they were entitled to occupy their traditional territories free from interference; and, (ii) the Commonwealth had no legal interest in the land enabling it to effectively grant the lease in question to Nabalco. (The Yirrkala also originally sought damages on grounds that the Commonwealth Government can only acquire property on 'just terms' [see s.51(xxxi) of

⁸⁰ *Milirrpum v Nabalco Pty Ltd and the Commonwealth of Australia* (1971) 17 FLR 141.

⁸¹ H. McRae, Nettheim, and Beacroft (1991), pp. 103-104.

the *Commonwealth of Australia Constitution Act*⁸²], but this claim was dropped during the course of the proceedings⁸³).

In support of their claim, the Yirrkala argued against the long-standing doctrine of *terra nullius* and asserted unique proprietary ownership rights to the land in question based on the doctrine of continuing communal native title. Unfortunately for the Yirrkala Peoples, however, the evidence presented was not considered sufficient to reverse the tides of Australia's colonial history. In sum, although the deciding justice - Justice Blackburn – opined that the evidence presented demonstrated “a subtle and elaborate system [of social rules and customs] highly adapted to the country in which the people led their lives”⁸⁴ he found that the Yirrkala's attempt to establish native title at common law failed at each major step. As Rosemary Hunter explains:

[His Honour Justice Blackburn] considered that the colonial policy of ignoring Aboriginal interests showed that communal native title did not exist in Anglo-Australia. He noted that there had always been an official policy of concern for Aboriginal people in Australia, but that it took the form of protection and did not include recognition of native title. Indeed, he found that the protective attitude adopted was necessitated by the fact that Aboriginal interests had not been recognised. In particular, he construed that creation of reserves and the forcible removal of Aboriginal People thereto, regardless of the location of their ancestral lands, as the manifestation of an intention to dispose of all Australian land without regard to Aboriginal interests.⁸⁵

⁸² This section reads: “51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good governance of the commonwealth with respect to ... (xxxi) the acquisition of property on just terms from any State or person for any purpose in respect of which the Parliament has power to make laws.”

⁸³ See: *Milirrpum*, *supra* note 80, Blackburn J. at p. 150.

⁸⁴ *Ibid*, at p. 267.

⁸⁵ Rosemary Hunter, “Aboriginal histories, Australian histories and the law” in Brian Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (St. Leonards: Allen and Unwin, 1996), pp. 9-10. See also: *Milirrpum*, *supra* note 80, Blackburn J. at pp. 252-262 and 274-283.

As a result of this analysis of Australian colonial history (and the binding precedent set in *Cooper v Stuart* (1889) – see above), Justice Blackburn dismissed the Yirrkala’s action against Nabalco and the Commonwealth Government on the grounds that “the doctrine of [native title] does not form, and never has formed, part of the law of any part of Australia.”⁸⁶ Justice Blackburn furthermore opined that even if such a doctrine did exist, the Yirrkala had failed to meet the requirements necessary to prove such a title, and that even if the Yirrkala had once held judicially defensible native title to the lands in question, such a claim was no longer relevant because any native title that may have at one time existed had already been extinguished by lawful acts of government.⁸⁷ According to Steward Harris, however, “[t]his strictly legal conclusion, which Blackburn J. (as a man, not a lawyer) must have found contrary to natural justice, led him to indicate in his judgement that the government should consider legislation on the matter.”⁸⁸

Uncertain that they could convince another court to overturn the Blackburn judgement (and the legal reasoning on which it was based) the Yirrkala People decided not to launch an appeal of the *Milirrpum* decision and instead focused their energies on convincing the Commonwealth government to act on Justice Blackburn’s call for a political response to indigenous land claims.

⁸⁶ As quoted in: Janice Gray, “The *Mabo* Case: A Radical Decision?” *Canadian Journal of Native Studies* 17:1 (1997), pp. 36.

⁸⁷ McRae, Nettheim, and Beacroft (1991), pp. 104-105.

⁸⁸ Steward Harris (for the Aboriginal Treaty Commission), *‘It’s Coming Yet ...’: An Aboriginal Treaty Within Australia Between Australians* (Canberra: Aboriginal Treaty Commission, 1979), p. 25.

ii) The Recognition of Indigenous Land Rights in Statute Law

Prior to 1966, there was no Australian legislation that either implicitly or explicitly recognized Indigenous Peoples' unique rights and interest in respect of their traditional territories. Although the protectionist policies adopted by all States during the 19th century saw reserve lands set aside for the 'benefit' of Indigenous Peoples, such lands remained Crown property and were managed by government officials (or, in the case of missions, by churches). As McRae, Neetheim, and Beacroft explain:

Under the successive government policies of protection and assimilation it was inconceivable that the Aboriginal residents [of reserves] should be given any voice in decisions relating to land use or management, let alone ownership. Governments could authorize mining, or other uses of the land, virtually at will. Where provisions had been inserted [in State legislation] to protect the Aboriginal residents [of a reserve], the area in question was simply excised from the reserve [to permit the governments' desired land uses to proceed uninhibited]."⁸⁹

Although the Australian public had been largely unconcerned with such policies during the 19th and early 20th centuries, the widely publicized Gurindji Land Rights Strike of 1966⁹⁰ followed closely by the Yirrkala Peoples' unsuccessful native title claim

⁸⁹ McRae, Neetheim and Beacroft, (1991), p. 148.

⁹⁰ In August 1966 the Gurindji People walked off the Wave Hill cattle station and established a make-shift village in close proximity to the most sacred of their religious sites at Wattie Creek. Initially misinterpreted as a protest against appalling working conditions, the Gurindji walk-off was in fact a protest against the dispossession of their traditional territories. When the Gurindji People's demand for a return of their traditional territories was finally understood, it attracted strong support from the public both overseas and in Australia (as well as strong opposition from both pastoralists and Australian governments). In spite of all the efforts made by Australian governments to break them, (efforts which included: moves to cut off their means of obtaining food supplies; threats of evictions; and bribery, including the offer of relatively attractive houses which the Government promised to build specially for them at the Wave Hill Welfare Settlement if they returned to work on the Wave Hill cattle station), the Gurindji persisted with their protest and stayed put at Wattie Creek until they got a freehold title to a substantial part of their tribal land. (See: Stan Pelczynski, "This Year's Special Anniversaries: the 1946 Aboriginal Stockmen's Strike in Western Australia and the 1966 Gurindji Land Rights strike in Northern Territory", (23 April 1996) available at: <http://home.vicnet.net.au/~aar/gurindji.htm>; Frank Hardy, *The Unlucky Australians* (Melbourne: Nelson, 1968); and, Frank S. Stevens, *Aborigines in the Northern Territory Cattle Industry* (Canberra: Australian National University Press, 1974).

against mining giant Nabalco (*Milirrpum v. Nabalco* (1971) - discussed above) created widespread sympathy for Indigenous causes, and particularly for the long-ignored Indigenous land rights movement. In response, State and Commonwealth governments began introducing a series of statutory provisions designed to grant communal title to Indigenous Peoples living on reserves and/or permit Indigenous Peoples to lodge 'traditional land claims' in respect of unalienated Crown land. In chronological order these are:

- *Aboriginal Land Trust Act, 1966-1975* (South Australia);
- *Aboriginal Land Act, 1970* (Victoria);
- *Aboriginal Land Rights (Northern Territory) Act, 1976* (Commonwealth, with respect to the Northern Territory);
- *Pitjantjatjara Land Rights Act, 1981* (South Australia);
- *Aboriginal Land Rights Act, 1983* (New South Wales);
- *Maralinga Tjarutja Land Rights Act, 1984* (South Australia);
- *Aboriginal Land Grant (Jervis Bay) Act, 1986* (Commonwealth, with respect to the Australian Capital Territory);
- *Aboriginal Land (Lake Condah and Framlingham Forest) Act, 1987* (Commonwealth, with respect to Victoria);
- *Aboriginal Land Act, 1991* (Queensland); and,
- *Torres Strait Land Act, 1991* (Queensland).⁹¹

Of course, the right to land conferred on Indigenous Peoples by these legislated land acts is not strictly speaking a 'native title' right. A 'native title' right is a justiciable right to land arising from Indigenous Peoples' prior use and occupancy of their traditional territories and/or their 'traditional' laws and customs and cannot be unilaterally extinguished without legally valid reasoning. The right to land conferred by

⁹¹ J.C. Altman, "Economic implications of native title: dead end or way forward?" in *Mabo and Native Title: Origins and Implications*, Will Sanders (ed), CAEPR Research Monograph No. 7 (Canberra: Centre for Aboriginal and Economic Policy Research – Australian National University, 1994), p. 63.

Commonwealth and State legislated land acts is simply an ordinary statutory 'land right' that owes its existence to the relevant legislating authority, meaning that it can be unilaterally altered or revoked at the whim and/or will of the same legislating authority without legal recourse.⁹² As a result, it was not until the High Court of Australia recognized native title as an existing (albeit unique) common law real property right that Australian political authorities were compelled to recognize native title as a viable legal right as well.

iii) The Recognition of Native Title at Common Law: Mabo v. State of Queensland (No. 1 and 2) [1988 and 1992]⁹³

In May 1982, Eddie Mabo and four other Meriam⁹⁴ people instituted proceedings against the State of Queensland in the High Court of Australia, seeking an order declaring:

- (1) that the Meriam People are entitled to the Murray Islands -
 - (a) as owners;
 - (b) as possessors;
 - (c) as occupiers, or
 - (d) as persons entitled to use and enjoy the said islands;
- (2) that the Murray Islands are not and never have been 'Crown Lands' within the meaning of the *Land Act 1962 (Qld)* (as amended) and prior Crown lands legislation; and
- (3) that the State of Queensland is not entitled to extinguish the title of the Meriam People.⁹⁵

⁹² For a detailed discussion of Australian land rights legislation see: McRae, Nettheim and Beacroft (1991), pp. 147-201.

⁹³ *Mabo v State of Queensland (No. 1)* (1988) 166 CLR 186; *Mabo v. State of Queensland (No. 2)* [1992] 66 ALJR 408, 107 ALR 1, 175 CLR 1, 5 CNLR 1.

⁹⁴ The term 'Meriam' refers to the people of Mer – the eastern-most region of Torres Strait. Mer includes the Murray Islands and surrounding islands, quays and reefs. Its total landmass is approximately 9 square kilometres.

⁹⁵ *Mabo (No. 2)*, 66 ALJR 408, Brennan J at p. 437.

In support of their requested order, the Meriam claimed to have had an on-going connection with their islands since time immemorial and to have established their own social and political structures by which they continued to live. Although their statement of claim acknowledged that the islands of Mer had come under the sovereignty of the Crown in 1879, as part of the colony of Queensland, it also asserted that the Crown's authority was ultimately subject to their continuing rights to land by virtue of: (a) their local or native customs; (b) their original ownership of the islands or 'traditional native title'; and (c) their present possession, occupation, use and enjoyment of the islands.⁹⁶ To ignore these continuing rights, they said, would involve a breach of fiduciary duty on the part of the State of Queensland and would entail the payment of compensation.

The State of Queensland's statement of defence, however, denied any foundation in law for the rights asserted by the Meriam. It furthermore asserted that *even if* such rights had *at one time* existed, they had most certainly been extinguished by either the declaration of sovereignty itself or, at the latest, by the terms of the State's 1910 *Land Act*, which 'reserved' the islands of Mer (with the exclusion of two acres leased to a missionary society in 1882) for the use of Indigenous people. As part of its defence, the Queensland government relied on the 1985 *Queensland Coast Islands Declaratory Act*, which was enacted by the State legislature three years *after* the Meriam had formally lodged their statement of claim with the High Court of Australia. This Act stated that the government's intention in 1879 had been not only to acquire sovereignty over the islands

⁹⁶ Richard H. Bartlett, "The Landmark Case on Aboriginal Title in Australia: *Mabo v. State of Queensland*." In *The Recognition of Aboriginal Rights: Case Studies 1, 1996*, Samuel W. Corrigan and Joe Sawchuk (eds) , (Brandon: Bearpaw Publishing, 1996), pp. 132-150.

of Mer, but to extinguish any rights to land that the Meriam might have continued to have in the region.

In *Mabo v. State of Queensland (No. 1)*, however, the High Court declared the *Queensland Coast Island Declaratory Act, 1985* invalid as contravening s.10 of the *Racial Discrimination Act, 1975* (henceforth *RDA*), which makes it illegal to treat people of a particular race less favourably than those of another race.⁹⁷ In sum, “[t]he Queensland Act was characterised as an arbitrary deprivation of property and of the right to inherit, insofar as such rights, based on Meriam law, were taken away while leaving intact similar rights based on Queensland law.”⁹⁸ This issue having been resolved, the High Court returned its attention to the Meriam People’s claim of continuing native title.

Commencing on 28 May 1991, following the determination of all issues of fact by the Supreme Court of Queensland, *Mabo (No. 2)* was argued for four days before the High Court of Australia. One year later, on 3 June 1992, the landmark *Mabo (No. 2)* decision was handed down. By a startling six to one majority, the High Court of Australia discarded the long-standing doctrine of *terra nullius* on the grounds that:

⁹⁷ Section 10 of the *Racial Discrimination Act, 1975* reads as follows: (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin. (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention [which includes: the right to own property alone as well as in association with others; and, the right to inherit]. (3) Where a law contains a provision that: (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander; not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

The fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent was justified by a policy which has no place in the contemporary law of this country ... Whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted ... A common law doctrine founded on unjust discrimination in the enjoyment of civil and political rights demands reconsideration. It is contrary to both international standards and to the fundamental values of our common law to entrench a discriminatory rule which, because of the supposed position on the scale of social organisation of the indigenous inhabitants of a settled colony, denies them a right to occupy their traditional lands.⁹⁹

Accordingly, the High Court's decision recognised the existence of native title at common law and its endurance "where Aborigines and Torres Strait Islanders have maintained their connection with the land through the years of European settlement; and where the title has not been extinguished by valid acts of government."¹⁰⁰ As was held by the High Court (Justice Dawson dissenting):

- (1) Australian common law recognises a form of native title which, in the cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands.
- (2) Accordingly, excepting for the operation of Crown leases, the land entitlement of the inhabitants of the Murray Islands, in Torres Strait, is preserved, as native title, under the law of Queensland.
- (3) The land in the Murray Islands is not Crown land within the meaning of that term in the *Land Act* 1962 (Qld).¹⁰¹

⁹⁸ Garth Netheim, "Native Title Legislation: How Will it Work?", *Native Title and the Trans Tasman Experience Conference*, Sydney (24-25 February 1994), p. 2.

⁹⁹ *Mabo (No. 2)*, *supra* note 95, Brennan J at p 422. See also: *Mabo (No.2)*, *supra* note 95, per Brennan J (Mason CJ and McHugh H agreeing), p. 409; Brennan J at pp. 414-423; *per* Deane and Gaudron JJ, at p. 409; Deane and Gaudron JJ, at pp.438-440; *per* Toohey J, at p. 410; and, Toohey J at pp. 482-484.

¹⁰⁰ Lorna Lippman, *Generations of Resistance* (3rd ed.; Melbourne: Longman Cheshire, 1994), p. 172.

¹⁰¹ *Mabo (No. 2)*, *supra* note 95, *held* (by the Court, with Dawson J dissenting), p. 408.

According to the High Court, the exact character of native title rights was to be determined according to the traditional laws and customs of Aboriginal and Torres Strait Islander Peoples and thus would likely differ in kind from one claim to another (see Chapter 3). An inquiry into the traditional laws and customs of the Meriam, however, led the court to declare:

that the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer except for that parcel of land leased to the Trustees of the Australian Board of Missions and those parcels of land (if any) which have been validly appropriated for use for administrative purposes the use of which is inconsistent with the continued enjoyment of the rights and privileges of Meriam people under native title; [and,]

that the title of the Meriam people is subject to the power of the Parliament of Queensland and the power of the Governor in Council of Queensland to extinguish that title by valid exercise of their respective powers, provided any exercise of those power is not inconsistent with the laws of the Commonwealth.¹⁰²

Although an important decision, the *Mabo (No. 2)* decision was also a very limited decision, as were its likely implications. In the High Court's decision, a majority of four justices held that Aboriginal and Torres Strait Islander Peoples are not entitled to compensation for the wholesale dispossession of their traditional territories, even if their native title was wrongfully terminated in 'the past' (meaning, prior to the coming into force of the *RDA* in 1975) by, for example, the forced removal of an Indigenous group from its traditional territory. The Court also ruled that native title was and is extinguished by any act 'inconsistent with native title' (for example: legislation of Crown grant which allows for a public facility to be built on the land, or for land to be set aside

¹⁰² Ibid, Brennan J (Mason CJ and McHugh J concurring), p. 437.

for a public purpose inconsistent with native title).¹⁰³ Furthermore, the Court determined that once native title has been lost it cannot be revived.

The *Mabo (No. 2)* decision, therefore, permits the assertion and/or confirmation of native title for only remote 'traditional' Aboriginal and Torres Strait Islander Peoples who were not dispossessed of their lands prior to 1975 (probably due to the undesirability of their lands for economic development and/or resource extraction) or who managed to maintain continuous connections with and access to their traditional territories for over two centuries despite non-indigenous encroachments (probably due to weak government, industry and/or public attempts at dispossession). (A more detailed examination of the *Mabo (No. 2)* decision is offered in Chapters 3, 4 and 5).

According to Lippman, however, "[v]ery few if any, decisions of the High Court have met with such a highly emotional and politically charged outburst as has the *Mabo* decision."¹⁰⁴ The fear of economic mayhem sewn by the conservative state governments, the federal opposition and sectoral capitalist interests quickly led to a very public 'backlash' against native title and Aboriginal and Torres Strait Islander rights in general. Outbursts from the mining industry and State premiers and a deliberate campaign of misinformation quickly spread fears among non-indigenous Australians that the decision would cause the loss of ownership of private dwellings and land. Criticism was also directed at the High Court itself with its performance being described as a "lamentable

¹⁰³ Aboriginal Provisional Government, "The *Mabo* Case: The Court Gives an Inch But Takes Another Mile", *APG Papers* (June) 1992, p. 41.

¹⁰⁴ Lippman (1994), p. 172.

failure in one of the Court's most important duties, i.e. the legal and public defense of property in Australia."¹⁰⁵

After over two centuries of policy making according to the doctrine of *terra nullius*, Australian governments, industry leaders and the general public were clearly not felicitous of a new policy course guided by the recognition of native title at common law, as the recognition of native title in statute law clearly demonstrates.

iv) The Recognition of Native Title in Statute Law: The Native Title Act, 1993

In October 1992, only four months after the *Mabo (No. 2)* decision was handed down, the Commonwealth government announced a consultation process aimed at achieving an appropriate and just national response to the High Court's landmark decision. According to many (if not most) non-indigenous Australians, national native title legislation was considered necessary in order to: validate past grants of land made and other actions taken without reference to the existence of native title; secure a process for future dealings in land; and, establish with certainty and without constant litigation whether or not land would be the subject of native title claims. "Aboriginal people, on the other hand, were more content to rely on the judgment itself as establishing when and if Native title existed in regard to specific areas of land. Presumably if there were disagreements resolution would have to be made through mediation or through the Courts."¹⁰⁶ In the end, however, the perceived need for 'certainty' won the day and the Commonwealth government quickly embraced the goal of national native title legislation.

¹⁰⁵ Mining executive Hugh Morgan as quoted in Gray (1997), p. 39.

¹⁰⁶ Gray (1997), p. 65.

On 3 June 1993, following intensive consultations with Aboriginal Land Councils, miners and State, Territory and Commonwealth government representatives, the Commonwealth government released a discussion paper which was intended to reconcile the conflicting interests of miners, developers, pastoralists and State governments (whose interests largely coincided) on the one hand and Indigenous Peoples on the other. In the end, however, the discussion paper failed to reconcile anyone to anything and was met with strong and conflicting objections on both sides.

In response, representatives from Indigenous communities from across Australia met in July to discuss their vision of an appropriate political response to the *Mabo (No. 2)* decision. Their position, including the principles they felt should underlie any national native title legislation, was detailed in the *Eva Valley Statement*, which was subsequently presented to the Commonwealth government. At the same time, State leaders, mining officials and other sectoral interests vigorously campaigned for the 'restoration' of non-indigenous property rights and national economic security.

Finally succumbing to industry pressure, the Commonwealth government released a statement in September 1993 in which it publicly contemplated the creation of national native title legislation that would suspend the *RDA* in order to validate existing titles to land¹⁰⁷, permit the wholesale extinguishment of native title rights and interests, and create

¹⁰⁷ Under the *Racial Discrimination Act, 1975*, any Crown land divested since the Act came into operation on October 31, 1975 is potentially liable to claims of native title or compensation. As Poynton (1994) explains, "even though Aboriginal native title was previously unrecognized, it could not have been legally extinguished by government action since that Act came into force. And, since *Mabo* has now extended recognition to native title, it would be discriminatory and illegal for government to sell or lease any Crown land without first ascertaining whether it was subject to native title claims and, in that event, pay just compensation" [Peter Poynton, "Mabo: Now You See It, Now You Don't", *Race & Class* 35:4 (1994), p. 44].

State tribunals for the resolution of continuing native title claims¹⁰⁸.

Not surprisingly, Aboriginal and Torres Strait Islander Peoples were vehemently opposed to the government's statement. They and their non-indigenous supporters formed the *Coalition of Aboriginal and Torres Strait Islander Organizations Working Party* to assert the Indigenous position on national native title legislation and urge the government to reconsider its proposed policy course. In September and October 1993, seven representatives of the Coalition (including leading indigenous Land Council representatives and the chairperson of the Aboriginal and Torres Strait Islander Commission [ATSIC]) met with the Prime Minister and his advisers to discuss the proposed national native title legislation.

As a result of these meetings, the main objections (though not all) of Aboriginal and Torres Strait Islander Peoples to the proposed legislation were overcome. In an historic compromise, Indigenous representatives accepted the government's proposed process for the retroactive validation of non-indigenous landholder interests in exchange for a guaranteed 'right to negotiate' non-indigenous land use on traditional Indigenous territories and the establishment of a National Native Title Tribunal to facilitate the resolution of outstanding native title claims.

Based upon this historic compromise, the *Native Title Act* finally passed through federal parliament on 23 December 1993, after two Green Party senators (who held the balance of power in the Senate) forced last-minute changes and amendments even more

¹⁰⁸ It is important to note that State governments have generally been more hostile to native title and indigenous rights claims than has the Commonwealth government, hence Indigenous people have strongly opposed any extension of State authority over the protection of their rights and interests.

favourable to Indigenous interests than (then) Prime Minister Paul Keating had contemplated. In brief, the *Native Title Act, 1993*:

- recognizes the common law principle of native title, as established by the High Court in *Mabo (No. 2)*;
- gives validity to ‘past acts’ – past grants of interests in lands or waters made invalid because of native title (‘past’ is defined as falling between the coming into effect of the *RDA - 1975* - and the *Mabo (No. 2)* decision - 1992; prior to 1975 grants made without regard for native title were legal);
- provides for future dealings affecting native title (‘future acts’);
- sets out a process for establishing native title claims; and
- establishes an impartial National Native Title Tribunal, the functions of which include the determination of claims asserting the existence of native title.¹⁰⁹

(This Act is discussed in greater detail in chapters 6 and 7).

On 2 December 1993, in the interim between the passage of the *Native Title Bill* and the coming into force of the *Native Title Act*, however, royal assent was given to the *Land (Titles and Traditional Usages) Act, 1993* of Western Australia. This Act “purported to extinguish all native title and substitute ‘rights of traditional usage’, which were ‘administratively defeasible’ and inferior to other rights granted by the Crown.”¹¹⁰ Although this Act was ultimately struck down by the High Court of Australia in March of 1995 (*Western Australia v. The Commonwealth* (1995)¹¹¹), it is just one illustration among many of the determination of non-indigenous governments to avoid the implications of the High Court’s recognition of native title and of the Commonwealth’s limited actions to ensure implementation of this recognition nationally.

¹⁰⁹ Australia, Federal Race and Discrimination Commissioner, “Face the Facts: Some Questions and Answers About Immigration, Refugees and Indigenous Affairs” (1997), p. 31.

¹¹⁰ Richard H. Bartlett, “Native Title in Australia: Denial, Recognition and Dispossession”, in Havemann (1999), p. 418.

¹¹¹ *Western Australia v. The Commonwealth* (1995) 183 CLR 373.

Despite the fact that most observers in the common law world see little to nothing remarkable about the *Native Title Act, 1993*, it is still considered radical by most Australians. In fact, as chapters 6 and 7 will clearly demonstrate, the *Native Title Act, 1993* and the amendments made to it by the *Native Title Amendment Act, 1998* (discussed below) promote a policy of native title extinguishment over native title recognition and do much more to confirm non-indigenous interests in land than they do to recognize and protect native title. This is particularly true given the High Court of Australia's 1996 decision in *The Wik and the Thayorre Peoples v. State of Queensland [1996]*.

iv) Native Title's Recognition at Common Law Part II: The Wik Peoples and the Thayorre People v. State of Queensland [1996]¹¹²

A major issue not resolved by the High Court in *Mabo (No. 2)* was whether or not Crown leases (particularly pastoral leases) extinguished native title by virtue of inconsistency. This question was brought to the High Court in June 1993 by the Wik Peoples, with the Thayorre People later joining as respondents. At issue in *The Wik Peoples and The Thayorre People v. State of Queensland (1996)* (henceforth *Wik*) was whether the grant of pastoral leases over two large areas of land in Queensland had necessarily extinguished native title to those areas. In one case, the lease (despite being in existence for many decades) had never been used to run cattle; in the other case, use had been minimal. In fact, the evidence presented at trial indicated that Indigenous Peoples had continued to use and occupy one of the areas concerned for many years without ever knowing that the area had been gazetted as a pastoral lease.¹¹³

¹¹² *The Wik Peoples and the Thayorre People v. State of Queensland (1996)* 71 ALJR 173.

¹¹³ Rob Hagen, "Native Title" (2000), p. 5, (available at: www.netSPACE.net.au/~rodhagen/nativetitle.html).

The Queensland government argued that the leases at issue, granted under its *Land Act 1910* and *Land Act 1962*, were true leases in the common law sense and thus necessarily conferred rights of exclusive possession on the leaseholders. Those rights, according to the Queensland government, were inconsistent with the continued existence of native title rights, and so, in accordance with the *Mabo (No. 2)* decision, necessarily extinguished them.¹¹⁴ The Wik and Thayorre Peoples argued that native title can only be extinguished by a law or an act of government which shows a ‘clear and plain intention’ to extinguish native title, which the acts in question, in their opinion, clearly did not.

In its decision of 23 December 1996, the High Court ruled that the laws creating pastoral leases in Queensland did not reveal a ‘clear and plain intention’ to extinguish native title, as the Court determined was required. Pastoral leases in Australia, the Court found, had been created to meet the unique needs of an emerging pastoral industry. The rights and interests of any given pastoral leaseholder, it was therefore held, had to be determined by looking at the relevant statute and at the particular lease itself. Such an inquiry revealed that the leases in question did not give the leaseholders a right to ‘exclusive possession’ of the land. As a result of this finding, the Court determined that the granting of a pastoral lease did not *necessarily* extinguish native title and that native title *could* co-exist with the rights of a leaseholder (whether or not the Wik and Thayorre Peoples actually held native title to the land at issue was not decided by the Court). At the same time, however, the Court also ruled that where there was a conflict or

¹¹⁴ Peter Butt, “Conveyancing” *Australian Law Journal* (May) 71:5 (1997), p. 327.

‘inconsistency’ in the exercise of pastoral leaseholder rights and native title rights, native title rights were subordinate.¹¹⁵

Approximately 42.1 percent of the Australian landmass is held under Crown leaseholds, which are mainly pastoral.¹¹⁶ Clearly, the *Wik* decision has enormous ramifications in the context of native title recognition in Australia. Few of Australia’s political leaders, however, are willing to accept the High Court’s decision that pastoral leases and native title can coexist, as the terms of Australia’s amended *Native Title Act* clearly demonstrate.¹¹⁷

vi) Native Title’s Recognition in Statue Law Part II: The Native Title Amendment Act, 1998

Since the drafting of the original *Native Title Bill*, Indigenous people have criticized the Commonwealth Government for significantly limiting their ability to successfully assert and defend claims of continuing native title, intentionally creating an unduly bureaucratic process for the authoritative determination of continuing native title, and unabashedly favouring non-indigenous interests in lands potentially subject to claims of continuing native title. As a result, following the *Wik* decision, Indigenous people and their supporters pressed for a wholesale revision of the *Native Title Act* that would reflect the reinforcement and extension of their native title rights in line with the latest High Court decision. The Commonwealth government, however, was not prepared to meet Indigenous people’s demands. Instead, it once again sought to appease those miners,

¹¹⁵ Australia, Federal Race Discrimination Commissioner (1997), p. 32.

¹¹⁶ Gray (1997), p. 64.

pastoralists and other conservative forces whose indignation over *Mabo (No. 2)* had now been extended with equal vehemence to *Wik*. These politically powerful forces called on the Commonwealth government to ensure the rights of non-indigenous Australians (particularly sectoral capitalist interests) or risk economic, social and political instability and the Commonwealth government complied.

In May 1997, the Commonwealth government released its response to the *Wik* decision in the form of a '10-Point Plan' for the revision of the *Native Title Act, 1993*. Not only did the 10-Point Plan demonstrate the government's refusal to accept the recent High Court ruling, it also demonstrated a notable retreat on some of the major legislative gains (supported by the *Mabo (No. 2)* decision) made by Indigenous people in the original legislation. The main features of the 10-Point Plan are as follows:

1. Validate all illegal grants extinguishing native title made by State governments between the coming into effect of the *Native Title Act, 1993* and the High Court's 1996 *Wik* decision.
2. Permit the upgrading of pastoral leases to allow for a broader range of land use activities (full primary production uses) than was previously allowed (grazing and related activities).¹¹⁸
3. Remove the right of native title holders to negotiate over mineral developments at the exploration stage.
4. Institute a more strict native title claim registration test and make registration a threshold for accessing negotiation rights.
5. Permanently extinguish native title on 'exclusive tenures' (leases or freehold), even when the land in question has reverted to the Crown.¹¹⁹
6. Create a 'sunset clause' that will disallow native title claims after a cut-off date (1999 and 2001 were proposed).

¹¹⁷ For additional commentary on reactions to the *Mabo* decision see: Andrew Markus, "Between *Mabo* and a hard place: race and the contradictions of conservatism" in Attwood (1996), pp. 88-99; Brian Attwood, "Mabo, Australia, and the end of history" in Attwood (1996), pp 100-116.

¹¹⁸ This provision would increase the possibility of 'inconsistency' and thus the subordination of native title rights to pastoral leaseholder rights.

¹¹⁹ Most vacant Crown land in Australia was at one time covered by a pastoral lease or other defensible tenure.

7. Remove the rights of native title holders to negotiate over developments on vacant Crown land within town boundaries.¹²⁰
8. Limit access rights for traditional purposes (such as ceremonies and hunting) to native title claimants who have a continuing physical connection and access to the land, and meet the more stringent registration test.
9. Abolish or strictly limit the powers of the National Native Title Tribunal in favour of State tribunals.
10. Allow the *Native Title Act* to override the *RDA*.¹²¹

The Commonwealth government claimed that the 10-Point Plan was based on its acceptance of the *Wik* decision and that it respected the principles of native title set forth in the High Court's *Mabo (No. 2)* decision. Then Deputy Prime Minister Tim Fischer, however, was not alone when he described the 10-Point Plan as containing 'bucketsfuls of extinguishment'.¹²² Mr. Djerrkura¹²³ (then Chairman of ATSIC) agreed: "In fact the 10-Point Plan leaves native title holders largely without any of the substantive rights or benefits of native title."¹²⁴

The first of three *Native Title Act Amendment Bills* incorporating the 10-Point Plan was introduced in the House of Representatives on 4 September 1997. The Senate, however, refused to accept this Bill and its subsequent version (introduced in the House in early April 1998) as presented and returned them to the House with numerous

¹²⁰ These boundaries are often much larger than towns themselves.

¹²¹ For a critical discussion of the 10 Point Plan please see: "The Howard 10 Point Plan", *Land Rights News* (June) 1997, p. 14; "What are the International Implications of Australia's Proposed Legislative Response to the Wik Decision", Press Conference Transcript (Parliament House, Canberra) 16 May 1997; and, ATSIC, "The Ten Point Plan on Wik & Native title: Issues for Indigenous Peoples" (June) 1997 (available at: www.atsic.gov.au/issues/Native_title/10point.htm).

¹²² ATSIC, "The Ten Point Plan on Wik & Native title: Issues for Indigenous Peoples" (June) 1997 (retrieved from: www.atsic.gov.au/issues/Native_title/10point.htm - 04/13/00).

¹²³ Mr. Djerrkura passed away in May 2004. In keeping with the customs of his peoples, Mr. Djerrkura's first name has been omitted from this text.

¹²⁴ ATSIC (1997b).

amendments. In both instances, however, the House refused to accept the Senate's amendments and the Bills were defeated.

Finally, in late June of 1998, after more than a year of House-Senate deadlock, the Prime Minister announced that an agreement had been reached with independent Senator Brian Harradine over further amendments to the *Native Title Amendment Bill* that would enable Senator Harradine to support the Bill's third passage through the Senate. Eighty-eight additional amendments to the *Native Title Act Amendment Bill* were quickly passed by the House and, after a lengthier debate, were finally accepted by the Senate on 7 July 1998. The amended Bill was passed by the Senate on 8 July 1998 and the *Native Title Amendment Act* received royal assent on 27 July 1998, with most of its provisions coming into effect on 30 September 1998.¹²⁵

The so-called 'Howard/Harradine Agreement' was a bitter disappointment to Indigenous people who were not consulted on this crucial last minute compromise that significantly altered native title legislation in Australia and significantly limited the practical effect of the High Court's judgement and reasoning in *Mabo (No. 2)* and *Wik*. Although the Howard/Harradine Agreement is arguably an improvement on the Government's original proposals and subsequent Bills, it is still, in reality, the unfair 10-Point Plan with some minor changes (the *Native Title Amendment Act, 1998* will be discussed in more detail in chapters 6 and 7).¹²⁶

¹²⁵ ATSIC, *Aboriginal and Torres Strait Islander Peoples and Australia's Obligations Under the United Nations Convention on the Elimination of All Forms of Racial Discrimination*, Report to the United Nations' Committee on the Elimination of all forms of Racial Discrimination (CERD), (February) 1999, pp. 3-4.

¹²⁶ For discussion of the *Native Title Amendment Act, 1998* and its implications see: ATSIC, *Detailed Analysis of the Native Title Amendment Act 1998*. (rev. ed. [October]; Canberra: ATSIC, 1998); Aboriginal Legal Services of Western Australia, "Summary Effect of Native Title Amendment Act 1998", available at: www.mp.wa.gov.au/giz-watson/nt.als.html); ANTaR, "The Agreement on Native Title Compared with

The Indigenous people of Australia and their supporters are not alone in their condemnation of the Australian government's treatment of native title in policy. In 1998, following the government's incorporation of roughly 70 percent of the 10-Point Plan into the *Native Title Act* amendments, ATSIC wrote to the UN's Committee for the Elimination of Racial Discrimination (CERD) to ask it to review the Commonwealth's proposed amendments, arguing that they were in contravention of the *International Convention for the Elimination of All Forms of Racial Discrimination* (which was signed by Australia in 1966 and brought into effect with the coming into force of *RDA* on 31 October 1975). In response, the CERD issued three decisions (March 1999, August 1999 and March 2000) expressing serious concern that four specific provisions of the amended native title legislation (its 'validation' provisions; its 'confirmation of extinguishment' provisions; its 'primary production upgrade' provisions; and, its restrictions on native title holders' 'right to negotiate' non-indigenous land use) discriminate against native title holders. These decisions also noted that the lack of effective participation by Indigenous people in the formulation of the amendments also raises concern about the Australian government's compliance with its obligations under the UN Convention.

The Commonwealth government's response, however, has been to expressly and publicly dismiss the findings of the Committee and hold fast to the self-serving political position that "Australian laws are made by Australian parliaments elected by the Australian people, not by UN committees."¹²⁷

the Ten Point Plan", attachment to the National Indigenous Working Group on Native Title (NIWG) Media Release, 5 July 1998, available at: www.antar.org.au/10ptsvsho-ha.html); and, ATSIC, "Federal Government Must Act on CERD Concern", Webcentral Media Release, 23 March 2000.

¹²⁷ Former Prime Minister John Howard as quoted in "UN Condemns Australia" (2000), p. 3 (retrieved from: www.law.mq.edu.au/Units/law/309/uncond.htm - 05/27/00).

vii) *Commentary on the Legal and Political Recognition of Native Title in the Australian Case*

At first glance, the recognition of native title at common law and in central government policy appears to be at fundamental odds with the initial and historically contingent recognition of Indigenous Peoples as mere ‘land inhabitants’ or ‘land users’ in the Australian case. As a result, *Mabo (No. 2)*, *Wik* and the *Native Title Act* have generated a great deal of uncertainty, fear and hostility among non-indigenous Australians. On closer examination, however, the recognition of native title at common law and in central government policy does much more to confirm the initial and historically contingent recognition and accommodation of indigenous rights to land in the Australian case than it does to reverse or deny it.

For example, although the High Court’s decision in *Mabo (No.2)* unequivocally discarded the doctrine of *terra nullius*, stating:

The facts known today do not fit the ‘absence of law’ or ‘barbarian’ theory underpinning the colonial reception of the common law of England in its relation to indigenous people. As the basis of the theory is false in fact and now unacceptable in our society the Court would not allow the common law to be, or be seen to be, frozen in an age or racial discrimination.¹²⁸

neither the *Mabo (No. 2)* nor the *Wik* decision concurrently recognizes Indigenous Peoples as lawful land ‘owners’. Instead, these decisions recognize Indigenous Peoples’ lawful right to ‘use, occupy and/or possess’ their traditional territories ‘in accordance with their traditional laws or customs’ where this right ‘has not been extinguished’. As chapters 3 and 4 will explain in more detail, these qualified statements relating to native title’s source, nature and vulnerability at common law make native title much more akin

¹²⁸ *Mabo (No. 2)*, *supra* note 95, per Brennan J (Mason CJ and McHugh J agreeing), p. 409.

to a usufructuary or ‘personal interest’ right than to an exclusive ownership or ‘proprietary tenure’ right at common law.

Furthermore, as will be discussed in more detail in chapters 6 and 7, the Commonwealth Government’s recognition of native title in the *Native Title Act, 1993* and *Native Title Amendment Act, 1998* do much more to entrench Indigenous Peoples’ status as mere land inhabitants or land users than they do to elevate Indigenous Peoples to the status of potential (if not actual) land owners.

As a result, the comparatively limited and hotly contested recognition of native title at common law and in central government policy is, in fact, more consistent with the ‘self-reinforcing’ path dependence hypothesis (which posits that the initial and historically contingent accommodation of indigenous rights to land is substantially *reinforced* by the legal and political recognition of native title) than with the ‘reactive’ path dependence hypothesis (which posits that the recognition of native title at common law and subsequent political developments have *transformed* or *reversed* the initial and historically contingent accommodation of indigenous rights to land by initiating a ‘reactive’ sequence of legal and political events).

In sum, the recognition of native title at common law temporarily disrupted, but ultimately did not significantly alter, the pre-existing recognition and accommodation of indigenous rights to land in the Australian case.

CONCLUSION

As this chapter has demonstrated, the legal and political recognition of native title is notably more extensive and secure in the Canadian case than it is in the Australian case. This is owing to the fact that Canada's (post-)colonial recognition of native title at common law, in statute-law and in central government policy is largely consistent with colonial newcomers' initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners, while Australia's recognition of native title at common law, in statute law and in central government policy is *perceived* to be at fundamental odds with colonial newcomers' initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants or land users. As the following chapters will now demonstrate, this situation has given the Indigenous Peoples of Canada a relatively more substantial foundation on which to establish their legal and political claims of continuing native title.

As the following chapter will also demonstrate, however, the legal and political accommodation of native title in the post-common law recognition eras of *both* Canada and Australia owes significant allegiance to the recognition and accommodation of indigenous rights to land during the early colonial settlement eras of these two countries. In sum, although the presumed significance of native title's formal recognition by (post-) colonial legal and political institutions lies in the assumption that formal recognition facilitates the successful assertion and defense of contemporary Indigenous land claims, the following chapters will demonstrate that the judicial characterization of native title at common law and the native title claims processes designed by (post-)colonial political authorities have placed significant limits on Indigenous Peoples' practical ability to assert

and defend claims of continuing native title as well as to procure formal confirmation of their unique territorial rights in the post-common law recognition eras of both Canada and Australia.

CHAPTER 3

THE JUDICIAL CHARACTERIZATION OF NATIVE TITLE'S SOURCE, NATURE AND CONTENT

Concurrent with and subsequent to the recognition of native title at common law, the (post-)colonial judicial institutions of Canada and Australia have sought to breathe life into this unique common law real property concept by defining its general characteristics. The significance of native title's judicial characterization lies in the potential implications it has for the equitable resolution of native title claims (i.e. the judicial characterization of native title can either facilitate or impede Indigenous Peoples' practical ability to successfully assert and defend claims of continuing native title in respect of particular tracts of land). The judicial characterization of native title is also significant in that it has informed political understandings of this unique common law real property right and has thus pivotally influenced the political accommodation of native title in central government policy (see chapters 6 and 7).

Drawing primarily from the Supreme Court of Canada's judgment and reasoning in *Delgamuukw v British Columbia* [1997]¹ and the High Court of Australia's judgment

¹ *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

and reasoning in *Mabo v Queensland (No 2)* [1992]² and *Wik and Thayorre Peoples v State of Queensland* [1996]³, (the respective counties' most comprehensive decisions to date on the meaning of common law native title), this chapter will define, analyse and compare the judicial characterisation of native title's source, nature, and content (please see Appendix 2 for an abbreviated comparison of these and other characteristics of common law native title).

The main findings of this comparative analysis are four-fold. First, the judicial characterization of native title is notably different in Canada and Australia despite the fact that both countries' legal systems are embedded in the same common law traditions. Second, the judicial characterization of native title's source has had a profound impact on judicial characterization of native title's other characteristics. Third, differences in the judicial characterization of native title in Canada and Australia have significantly impacted Indigenous Peoples' practical ability to effectively challenge and prevent the dispossession of their traditional territories. And fourth, the judicial characterization of native title owes significant allegiance to the degree of recognition and respect afforded indigenous rights to land during the early colonial settlement period.

In order to understand the judicial characterizations of native title proffered by the Supreme Court of Canada and High Court of Australia, however, one must first have a general understanding of the common law system of land holding (also termed the common law system of 'real property'⁴), which identifies and defines the legal character

² *Mabo v Queensland (No 2)* [1992] 66 ALR 408.

³ *Wik and Thayorre Peoples v State of Queensland* [1996] 141 ALR 129.

⁴ The term 'property' refers to anything that is owned or possessed by a person or entity. There are two distinct types of 'property' recognized by the common law - 'real property' (also termed 'real estate' and 'immovable property') and 'personal property' (also termed 'personal effects'; 'movable property'; 'goods

of all land-based rights and interests in the settler dominions of the Anglo-Commonwealth.

I – THE COMMON LAW SYSTEM OF LAND HOLDING

The founding premise underlying the common law system of land holding is that the Crown is the ultimate owner of all land within her sovereign jurisdiction. This Crown ownership of (or ‘title’ to) land is called a *plenum dominium*, and invests the Crown with the exclusive authority to impart land related rights and interests to others. As a result, all ‘ordinary’ common law land rights or ‘titles’ are said to be held *of* the Crown, meaning they are carved out of the Crown’s *plenum dominium* and exist only in so far as the Crown has permitted them to exist. As Justice Brennan succinctly explained in *Mabo (No 2)*:

The land law of England is based on the doctrine of tenure. In English legal theory, every parcel of land in England is held either mediately or immediately of the King who is the Lord Paramount; the term ‘tenure’ is used to signify the relationship between tenant and lord ... , not the relationship between tenant and land ... It is implicit in the relationship of tenure that both lord and tenant have an interest in the land: The King had ‘dominium directum’, the subject ‘dominium utile’ ... Absent a ‘dominium directum’ in the Crown, there would be no foundation for a tenure arising on the making of a grant of land.⁵

Or as McRae, Nettheim and Beacroft explain in plainer English:

At the time of the full flowering of the feudal system (in Britain, in the years following the Norman Conquest of 1066) the two concepts [of sovereignty and proprietorship] were interlocked in a theory of tenures –

and chattel’; and, ‘personalty’). ‘Real property’ is property that is immovable, (i.e. an interest in land; buildings, crops or other resources still attached to or within the land; and improvements or fixtures permanently attached to the land or permanently attached to a structure on the land) and/or any interest, benefit, right or privilege in such property. ‘Personal property’, by contrast, property that is moveable, (i.e. all property other than real property) and/or any interest, benefit, right or privilege in such property.

⁵ *Mabo (No. 2)*, *supra* note 2, Brennan J at p. 424.

the king (the sovereign), being the ultimate owner of all the land, had the ultimate power to govern. Great feudal lords, tenants-in-chief of the sovereign, held their estates from the king in return for obligations of military and other services, loyalty, revenue, etc. Lesser tenants held their lands from the tenants-in-chief in return for obligations, and so on in a pyramidal pattern. In feudal theory, the king's power to govern the nation as a whole (sovereignty) was based on the notion that all subjects derived their land titles, directly and indirectly, from royal grant.

In the post-feudal age the concepts of sovereignty and proprietorship became distinct. In theory 'the Crown' (an abstraction from the monarchy, indicating the supreme executive power) is still the ultimate owner of land – lands not granted or leased are called Crown lands; land leased will revert to the Crown on expiry or forfeiture; and the Crown has the power (now regulated by statute) to 'resurem' (that is, to compulsorily acquire) land that has been granted or leased. On the other hand, individuals may have proprietorship.⁶

There are two general categories of 'ordinary' common law land rights: *proprietary tenures* and *personal interests*. A *proprietary tenure* is an 'ordinary' common law land right that conveys an unqualified legal and beneficial estate and equitable property interest in the actual land. For all intents and purposes, an individual in possession of a common law proprietary tenure is recognized as owning the land in question (usually in the form of a 'title in fee simple'), and may thus use said land however s/he chooses (i.e. s/he may occupy it, build on it, cultivate it, exploit its resources, and/or sell it). Accordingly, a proprietary tenure can not be 'wrongfully' (meaning without consent or without notice and equitable relief) extinguished by subsequent executive action and is legally defensible against all other claims to the land in question.

⁶ H. McRae, G. Nettheim and L. Beacroft, *Aboriginal Legal Issues* (Sydney: The Law Book Company Ltd., 1991), p. 62.

A *personal interest*, by contrast, is a non-proprietary common law land right that is absent any equitable estate or interest in the actual land. In sum, an individual in possession of a personal interest does not own the land in question but, rather, is invested with a right of permissive use and/or occupancy or a licence to use, occupy and/or enjoy the land in question according to the discretion of another (i.e. s/he has ‘usufructuary rights’ in respect of the land in question). For example, a forestry lease (which is a type of personal interest) permits its holder to harvest a certain number of trees, in a delineate geographic area, over a specified period of time, but does not convey ownership of the land itself. Accordingly, a personal interest can not compete on an equal footing with other proprietary interests and is susceptible to wrongful extinguishment by inconsistent grant. Within the hierarchy of ‘ordinary’ common law land holdings, then, a personal interest represents a much less substantial common law land right than does a proprietary tenure.

When the Crown acquired territory outside of England, there was a natural assumption that the common law system of land holding should apply. In situations where the Crown acquired sovereignty over lands already occupied by Indigenous Peoples, however, the doctrine of tenure (i.e. the assertion that all land is held *by* or *of* the sovereign Crown) could not be universally applied.⁷ As a result, a unique form of Crown title, called a *radical title*, was created in law to reconcile Crown sovereignty with pre-existing rights to land. As Justice Brennan explained in *Mabo (No. 2)*:

By attributing to the Crown a radical title to all land within a territory over which the Crown has assumed sovereignty, the common law enabled the

⁷ The legality of Crown declarations of sovereignty over Canada and Australia is an issue of considerable legal, political and moral debate. A detailed discussion of this point, however, is beyond the scope of this study.

Crown, in exercise of its sovereign power, to grant an interest in land to be held of the Crown or to acquire land for the Crown's demesne. The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown's purposes. But it is not a corollary of the Crown's acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land ... [because] there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied lands.⁸

In sum, the Crown's radical title is said to be 'burdened' or 'qualified' by Indigenous Peoples' pre-existing rights to land (i.e. native title) until such time as these rights are lawfully extinguished. Prior to the lawful extinguishment of native title, then, the Crown cannot exercise effective territorial control over Indigenous Peoples' traditional territories. Upon the lawful extinguishment of native title, however, the Crown's radical title is elevated to a *plenum dominium* and absolute beneficial title to the lands in question passes to the sovereign Crown. As Kent McNeil explains:

As for the doctrine of tenures, its effect in this context is to give the Crown a paramount lordship over lands held by subjects. The fiction of original Crown ownership and grants was invented to explain how this feudal relationship [i.e. between the Crown and her subjects] arose. That is the fiction's purpose and this is the extent of its application. The doctrine of tenures, though capable at common law of giving the Crown a title to land in the event an estate held of it expires, cannot be used otherwise to claim lands which subjects possess.⁹

The following table (Figure 6) provides a useful summary of the hierarchy of 'ordinary' common law land holdings:

⁸ *Mabo (No. 2)*, *supra* note 2, Brennan J at p. 425.

Figure 6 – Hierarchy of ‘Ordinary’ Common Law Land Holdings

	Source	Nature	Content	Vulnerability
Plenum Dominium (also termed ‘royal demesne’)	Crown sovereignty (i.e. Crown acquisition of land by cession, surrender or conquest; or Crown acquisition of land classified as ‘ <i>terra nullius</i> ’)	Unqualified paramount title held <i>by</i> the Crown (i.e. unqualified legal and equitable proprietary right to all real property within the Crown’s sovereign jurisdiction)	Imparts absolute beneficial ownership of the land itself	Can only be extinguished by cession, surrender or conquest Can not be infringed without Crown consent
Radical Title (also termed ‘underlying title’)	Crown sovereignty (i.e. Crown acquisition of land not classified as ‘ <i>terra nullius</i> ’/land occupied by Indigenous inhabitants)	Qualified paramount title held <i>by</i> the Crown (i.e. legal and equitable proprietary right to all real property within the Crown sovereign jurisdiction subject to or burdened by Indigenous Peoples’ pre-existing rights to the same land)	Imparts final or underlying beneficial ownership of the land itself (i.e. when radical title is ‘unburdened’ by the extinguishment of native title, the Crown’s title is elevated to a <i>plenum dominium</i>)	Can only be extinguished by cession, surrender or conquest Can not be infringed without Crown consent
Proprietary Tenure (also termed ‘common law estate’, ‘proprietary estate’, ‘common law title’ or ‘equitable estate’)	Crown grant of legal title (i.e. constructive possession); or statutory grant of legal title (i.e. title derived through adverse, exclusive, hostile or peaceable possession)	Unqualified legal and equitable proprietary right to delineated tracts of land held <i>of</i> the Crown (e.g. title in fee simple)	Legally imparts permissive beneficial tenure of the land Practically imparts full beneficial ownership of the land itself	Can be extinguished by inconsistent Crown or statutory grant but not without notice and equitable relief (i.e. compensation) or the consent of the lawful proprietor
Personal Interest (also termed a ‘derivative right’)	Crown or statutory grant of legal, beneficial, possessory and/or other (i.e. non-beneficial) interest(s) in land.	Qualified legal and non-equitable personal (i.e. non-proprietary) right to delineated tracts of land held <i>of</i> the Crown (e.g. leasehold tenures)	Imparts qualified beneficial interests in the land (e.g. a forestry lease) or qualified non-beneficial interests in the land (e.g. the public’s right to use, access and/or otherwise enjoy Crown land)	<u>As a qualified beneficial interest:</u> can be extinguished and/or infringed by inconsistent Crown or statutory grant in accordance with the terms of the entitling legal instrument (e.g. lease) <u>As a qualified non-beneficial interest:</u> can be extinguished and/or infringed at the will of the Crown

⁹ Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), p. 107.

Both the Supreme Court of Canada and the High Court of Australia have characterized native title as *sui generis* (meaning: unique; of its own kind; constituting a class alone; and/or peculiar) in order to distinguish it from ‘ordinary’ common law land rights at common law. As explained by Chief Justice Lamer in *Delgamuukw v British Columbia* [1998] (hereafter referred to as *Delgamuukw*):

Aboriginal title has been described as *sui generis* in order to distinguish it from ‘normal’ proprietary interests, such as fee simple. However ... it is also *sui generis* in the sense that its characteristics cannot be completely explained by reference either to the common law rules of real property or to the rules of property found in aboriginal legal systems. As with other aboriginal rights, it must be understood by reference to both common law and aboriginal perspectives.¹⁰

And explained by Justices Deane and Gaudron in *Mabo v Queensland (No 2)* (hereafter referred to as *Mabo (No 2)*):

The preferable approach is ... to recognise the inappropriateness of forcing the native title to conform to traditional common law concepts and to accept it as *sui generis* or unique.¹¹

As the remainder of this chapter will now demonstrate, however, the judicial characterization of native title (and its accompanying legal reasoning) is notably different in the Canadian and Australian cases. This, it is argued, is owing to the different degrees of recognition and accommodation afforded indigenous rights to land during the early colonial settlement periods of Canada and Australia respectively.

¹⁰ *Delgamuukw*, *supra* note 1, Lamer CJ at para 112.

¹¹ *Mabo (No. 2)*, *supra* note 2, Deane and Gaudron JJ at p 443. Also see: *Mabo (No. 2)*, *supra* note 2, *per* Deane and Gaudron JJ at p 409; Brennan J at p. 437; and, Toohey J at pp. 482 and 489; *Wik*, *supra* note 3, Kirby J at p. 257.

II - THE SOURCE/ORIGIN OF NATIVE TITLE

One dimension of *sui generis* native title identified by both the Supreme Court of Canada and the High Court of Australia is its source – unlike all ‘ordinary’ common law land rights, native title is not created by Crown grant. How it comes to exist at common law, however, has been differently reasoned in Canadian and Australian jurisprudence.

A – Canada

Canadian courts have vacillated between two possible sources of native title – prior occupation and indigenous laws and customs – without pronouncing clearly in favour of one or the other.¹² In *Delgamuukw*, for example, the majority of the Court defined the source of native title as “its recognition by the *Royal Proclamation, 1763* and the relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing the assertion of British sovereignty.”¹³ Stated another way, native title find its source in: the provisions of a royal prerogative (i.e. the *Royal Proclamation of 1763*), which “bears witness to the British policy towards aboriginal peoples *which was based on respect for their right to occupy their ancestral lands*”¹⁴ (emphasis added); “the common law principle that occupation is proof of possession in law”¹⁵; and, “the continued occupation and use of the land as part of the aboriginal peoples’ *traditional way of life*”¹⁶ (emphasis original).

¹² Kent McNeil, “The Meaning of Aboriginal Title” in *Aboriginal and Treaty Rights in Canada: Essays on Law, Equity and Respect for Difference*, Michael Asch (ed), (Vancouver: UBC Press, 1997), p. 137.

¹³ *Delgamuukw*, *supra* note 1, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1014.

¹⁴ *Ibid*, La Forest J at para 200.

¹⁵ *Ibid*, Lamer CJ at para 114.

¹⁶ *Ibid*, *per* La Forest and L’Heureux Dubé JJ; and, La Forest J at para 190 and 194.

Because Canadian courts have generally not required proof of aboriginal laws, aboriginal customs or aboriginal traditions as a prerequisite for establishing native title (see chapter 5), however, it is reasonable to assume that ‘prior occupancy’ is the primary source of native title in the Canadian case. As Justice Judson reasoned in *Calder v Attorney-General of British Columbia* [1973] (hereafter referred to as *Calder*): “the fact is that when the settlers came, the Indians were there, organized in societies and occupying the land as their forefather had done for centuries. This is what Indian title means.”¹⁷

According to the Supreme Court of Canada, it is ‘*prior* occupancy’ (meaning occupancy before the assertion of Crown sovereignty) that is the source of native title because native title crystallized (i.e. assumed a common law identity) at the time Crown sovereignty was asserted. In *Delgamuukw*, the majority determined that sovereignty (as opposed to the date of first contact between an Indigenous People and colonial newcomers) was the appropriate time to consider in the context of common law native title for three compelling reasons. First, from a theoretical perspective, the majority determined that because native title is a burden on the Crown’s radical title and the Crown “did not gain this title until it asserted sovereignty[,], it makes no sense to speak of a burden on the [Crown’s] underlying title before that title existed.”¹⁸ Second, from a legal perspective, the majority determined that because “any land that was occupied pre-

¹⁷ *Calder v. Attorney General of British Columbia* [1973] 7 CNLC 91 (SCC), Judson J at p. 328. More recently Justice Judson’s views were reiterated in *R v Van der Peet* [1996] 2 SCR 507 where Chief Justice Lamer (at para 30) wrote for the majority that the doctrine of aboriginal rights (one aspect of which is ‘native title’) arises from “one simple fact: when the Europeans arrived in North America, aboriginal peoples were already here living in communities on the land, and participating in distinctive cultures, as they had done for centuries” (emphasis original). See also: *Delgamuukw*, *supra* note 1, where Justice La Forest references the former at para 189).

¹⁸ *Delgamuukw*, *supra* note 1, *per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1017.

sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants”¹⁹, native title “does not raise the problem of distinguishing between distinctive, integral aboriginal practice, customs and tradition and those influenced or introduced by European contact.”²⁰ And finally, from a practical perspective, the majority determined that sovereignty was the most appropriate time period to consider in the context of native title because “the date of sovereignty is more certain than the date of first contact.”²¹

B – Australia

In Australia, by contrast, the High Court has identified ‘traditional’ (i.e. ‘pre-existing’) indigenous laws and/or customs as the primary (if not exclusive) source of common law native title. As held by the majority in *Mabo (No 2)*: “Australian common law recognises a form of native title which, in cases where it has not been extinguished, reflects the entitlements of the indigenous inhabitants, in accordance with their laws or customs, to their traditional lands”²²; and as reiterated by Justice Brennan in the same: “[n]ative title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory.”²³

¹⁹ Ibid, *per* Lamer CJ at para 151. Also see: La Forest J at para 199.

²⁰ Ibid, *per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1017.

²¹ Ibid.

²² *Mabo (No 2)*, *supra* note 2, *held* by the Court (with Dawson J dissenting) at p. 408.

²³ Ibid, Brennan J at p. 429.

Although ‘prior occupation and use’ was also referenced in the *Mabo (No. 2)* Court’s reasoning on the source of native title, this ancillary source of native title was only deemed relevant in so far as it was *derived from* or *evinced a practical manifestation of* pre-existing Indigenous laws and/or customs. As explained by Justices Deane and Gaudron: “... prior occupation or use under the common law native title *is explained by* the common law’s recognition of prior entitlement under the earlier indigenous law or custom and *is predicated upon* the absence of any intervening grant from the Crown”²⁴ (emphasis added).

In *Mabo (No. 2)* the High Court also identified ‘exclusive possession’ (again *derived from* pre-existing Indigenous laws and/or customs) as a possible source of native title²⁵, but only insofar as the fact of exclusive possession might be necessary to permit native title’s recognition at common law. As Justice Brennan explained in *Mabo (No. 2)*: “[i]f it be necessary to categorise an interest in land as proprietary in order that it survive a change in sovereignty, the interest possessed by a community that is in exclusive possession of land falls into that category.”²⁶

In sum, pre-existing Indigenous laws and/or customs (and not ‘prior occupancy’ or ‘exclusive possession’) have been identified as the primary (if not exclusive) source of native title in the Australian case.²⁷ As was explained in the High Court’s more recent decision in *Yanner v Eaton* (1999):

²⁴ Ibid, Deane and Gaudron JJ at p. 443; also see Toohey J at p. 486.

²⁵ Ibid, *per* Brennan J, Mason CJ and McHugh J agreeing, at p. 409; Brennan J on the conquest of Ireland and Wales at p. 235; and Toohey J at p. 495.

²⁶ Ibid, Brennan J at p.426.

²⁷ This characterization of native title’s source was confirmed in: *Fejo v Northern Territory* (1998) 195 CLR 96; *Yanner v Eaton* [1999] 166 ALR 258; and, *Western Australia v Ward* [2002] HCA 28.

[Native title] is the relationship between a community of indigenous people and the land, defined by reference to that community's traditional laws and customs, which is the bridgehead to the common law ...

Whilst recognised by the common law, native title and the rights, or incidents, thereof arise independently of the common law tenurial system ... [I]t is convenient to emphasise that ingrained and misleading habits of thought and understanding lurk in this area of law. Whilst there is 'an intersection' between them, common law (and statutory) estates and native title are derived from two distinct systems. The former is drawn from principles developed in the English common law, as modified by statute, whilst the latter finds its origins in 'the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'.²⁸

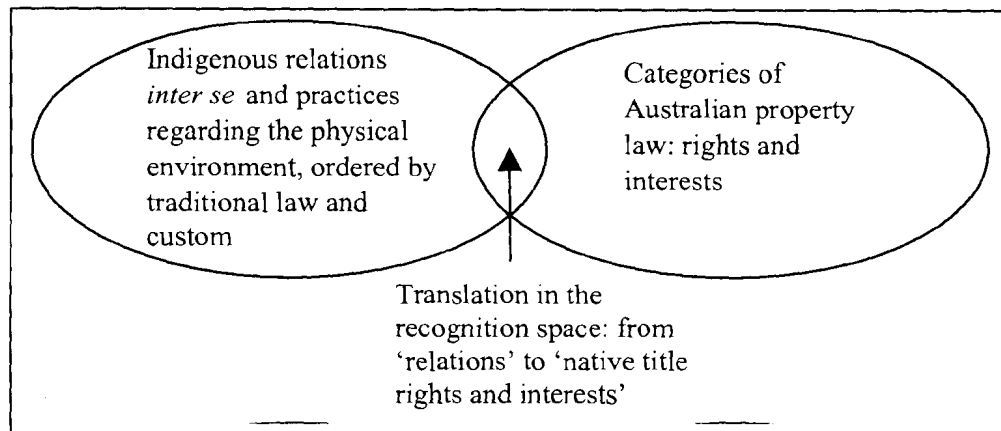
The 'intersection' of which the *Yanner* court spoke, has been usefully described as a 'recognition space' by Christos Mantziaris and David Martin:

Native title law attempts to translate a selected set of indigenous relations, ordered by the particular system of traditional law and custom [in question], into legal rights and interests. Native title is therefore produced through the combined operation of the common law and the particular indigenous system of traditional law and custom ... [T]he production of native title through 'intersection' of traditional law and custom and the Australian legal system is represented through the visual metaphor of the 'native title recognition space' – two intersecting circles. This simple visual device assists in distinguishing the *subject of legal recognition*, the relevant indigenous relations with the law received as fact, from the *product of legal recognition*, the native title rights and interests enforceable within the Australian legal system.²⁹ [see Figure 7]

²⁸ *Yanner v Eaton*, *supra* note 26, Gummow J at paras 72 and 76 (references omitted).

²⁹ Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press, 2000), p. 1.

Figure 7 – Native Title as the Product of a Recognition Space



Source: Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press, 2000), p. 17. Reproduced with permission.

Because the High Court of Australia has defined native title as a burden on the Crown's radical title (see 'Relationship between the Crown's Title and Native Title' below), it has followed the same judicial reasoning proffered by Canadian courts and has determined that native title crystallized when the Crown acquired sovereignty over the lands in question.³⁰

III - THE NATURE OF NATIVE TITLE

The nature of native title obviously depends to a large degree on the source of native title. For example, if native title is based on prior occupancy, occupancy at sovereignty must be proven by native title claimants, but the nature of native title is logically derived from the common law's recognition that occupancy gives rise to possession in the absence of a better claim to possession. If native title is based on indigenous laws and customs, by contrast, the existence of indigenous laws and customs

³⁰ *Mabo (No. 2)*, *supra* note 2, *per* Brennan J, Mason CJ and McHugh J agreeing, at p. 409.

(and particularly indigenous laws and customs relevant to the occupation and/or use of land) must be proven and the nature of native title must be defined with reference to those laws and customs. As a result, in Canada the nature of native title is a matter of *law* to be determined according to the interaction of the common law (specifically, property law) and pre-existing aboriginal law(s), while in Australia the nature of native title is a matter of *fact* to be determined according to evidence presented on the laws acknowledged and customs observed by native title claimants (see chapter 6).

This leaves some dimensions of native title beyond the scope of general statement in the Australian case. As Justice Brennan asserted in *Mabo (No. 2)*:

Native title has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory. The nature and incidents of native title must be ascertained as a matter of fact by reference to those laws and customs.³¹

In Canada, by contrast, general statements on the dimensions of native title are permitted because the source of native title is grounded, at least in part, in a general principle of the common law system of land holding, that being the common law principle that “occupation is proof of possession in law”.³² In sum, Canadian courts can draw on the common law to a much wider extent than can Australian courts to make general reasoned statements on the nature of *sui generis* native title. (It should be noted, however, that both the common law and indigenous law³³/indigenous perspectives on land³⁴ are to be considered when discerning the legal character of native title in the Canadian case).

³¹ Ibid, Brennan J at p. 429.

³² See Kent McNeil, *Common Law Aboriginal Title* (Oxford: Clarendon Press, 1989), p. 7 as referenced in *Delgamuukw*, *supra* note 1, Lamer CJ at para 114.

³³ See: *Delgamuukw*, *supra* note 1, *per* Lamer CJ and Cory, McLachlin and Major JJ at pp. 1014, 1016, 1018 and 1019; and Lamer CJ at para 126.

³⁴ See: *Delgamuukw*, *supra* note 1, *per* Lamer CJ and Cory, McLachlin and Major JJ at pp. 1017 and 1018; and Lamer CJ at para 84.

A - Dimensions of ‘Sui Generis’ Native Title

i) Source

One dimension of *sui generis* native title is its source - unlike all other titles recognised by the common law, native title is not created by Crown or statutory grant. As has already been explained, in Canada native title has been reasoned to derive from ‘prior occupation’, and in Australia native title has been reasoned to derived ‘traditional indigenous laws and/or customs’.

ii) Type of Landholding: Personal and/or Proprietary?

According to the majority in *Delgamuukw*, “[native] title is a right to the land itself. That land may be used, subject to the inherent limitations of aboriginal title, for a variety of activities, none of which need to be individually protected as aboriginal rights under s. 35(1) [of the *Constitution Act, 1982*]. Those activities are parasitic on the underlying title.”³⁵ According to the Supreme Court of Canada, then, native title is properly understood as a *sui generis* proprietary tenure that falls somewhere between a title in fee simple and a personal and usufructuary right (see Figure 8 below). As Chief Justice Lamer explained in *Delgamuukw*:

The starting point of the Canadian jurisprudence on aboriginal title is the Privy Council’s decision in *St. Catherine’s Milling and Lumber Co. v The Queen* (1888), 14 A.C. 46, which described aboriginal title as a ‘personal and usufructuary right’ (at p 54). The subsequent jurisprudence has attempted to grapple with this definition, and has in the process demonstrated that the Privy Council’s choice of terminology is not particularly helpful to explain the various dimensions of aboriginal title. What the Privy Council sought to capture is that aboriginal title is a *sui generis* interest in land ...

³⁵ *Delgamuukw*, *supra* note 1, *per* Lamer CJ and Cory, McLachlin and Major JJ, p. 31.

The idea that aboriginal title is *sui generis* is the unifying principle underlying the various dimensions of that title. One dimension is its *inalienability*. Lands held pursuant to aboriginal title cannot be transferred, sold or surrendered to anyone other than the Crown and, as a result, [native title] is inalienable to third parties. This Court has taken pains to clarify that aboriginal title is only ‘personal’ in this sense, and does not mean that aboriginal title is a non-proprietary interest which amounts to no more than a licence to use and occupy the land and cannot compete on an equal footing with other proprietary interests³⁶

The source of native title is intimately connected to the nature of native title. As

Chief Justice Lamer explained in *Delgamuukw*:

It had originally been thought that the source of aboriginal title in Canada was the *Royal Proclamation, 1763*: see *St. Catherine’s Milling*. However, it is now clear that although aboriginal title was recognized by the *Proclamation*, it arises from the prior occupation of Canada. That prior occupation, however, is relevant in two different ways, both of which illustrate the *sui generis* nature of aboriginal title. The first is the physical fact of occupation, which derives from the common law principle that occupation is proof of possession in law ... What makes aboriginal title *sui generis* is that it arises from possession *before* the assertion of British sovereignty, whereas normal estates, like fee simple, arise afterward ... This idea has been further developed in *Roberts v. Canada* [1989] 1 S.C.R. 322, where this Court unanimously held at p. 340 that “aboriginal title pre-dated colonization by the British and survived British claims of sovereignty” (also see *Guerin*, at p. 378). What this suggests is a second source for aboriginal title – the relationship between common law and pre-existing systems of aboriginal law.³⁷

In sum, native title has been reasoned to be ‘proprietary’ in nature because its source is ‘occupancy’ and the common law permits ‘occupancy’ to be equated with lawful possession in the absence of a better claim. At the same time, however, native title has been reasoned to be uniquely ‘proprietary’ in nature (i.e. *sui generis*) because the ‘occupancy’ in question (i.e. ‘prior occupancy’) pre-dates Crown sovereignty. As a result,

³⁶ Ibid, Lamer CJ at para 112-113.

³⁷ Ibid, Lamer CJ at para 114.

the nature of native title is a product of the relationship between the common law and pre-existing systems of indigenous law.

In Australia, by contrast, the High Court has reasoned that native title cannot be generally categorised as either proprietary or personal because the primary (if not exclusive) source of native title is pre-existing indigenous laws and customs. As Justice Brennan asserted in *Mabo (No. 2)*:

Native title to a particular land (whether classified by the common law as proprietary, usufructuary or otherwise) ... is ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.³⁸

And as Justice Toohey stated (in the same):

the specific nature of native title can be understood only by reference to the traditional system of rules. An inquiry as to whether it is 'personal' or 'proprietary' ultimately is fruitless and certainly is unnecessarily complex.³⁹

In the subsequent *Wik and Thayorre Peoples v State of Queensland* [1996] (hereafter referred to as *Wik*) decision, Justice Gummow accepted the reasoning proffered by Justices Brennan and Toohey in *Mabo (No. 2)* and included it in his own:

The content of native title, its nature and incidents, will vary from one case to another. It may comprise what are classified as personal and communal usufructuary rights involving access to the area of land in question to hunt for food or gather food, or to perform traditional ceremonies. This may leave room for others to use the land either concurrently or from time to time. At the opposite extreme, the degree of attachment to the land may be such as to approximate that which would flow from a legal or equitable estate therein. In all these instances, a conclusion as to the content of native title is to be reached by determination of matters of fact, as ascertained by evidence.⁴⁰

³⁸ *Mabo (No. 2)*, *supra* note 2, Brennan J at p. 443.

³⁹ *Ibid*, Toohey J at p. 489; also see Deane and Gaudron JJ at p. 443.

⁴⁰ *Wik*, *supra* note 3, Gummow J at p. 220.

In sum, it is in establishing proof of native title that Australian native title claimants concurrently (and on a case-by-case basis) define the precise nature of their unique real property interests at common law.

This having been said, however, the reasoning proffered by Justices Deane and Gaudron in *Mabo (No. 2)* provides a substantive basis for an implicit general characterization of native title as uniquely personal (rather than proprietary) in nature:

The content of such a common law native title [that being a title which is “prima facie based, not on such individual ownership as English law has made familiar, but on a communal usufructuary occupation”⁴¹] will, of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community. It may be an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown. (See, eg, *Amodu Tijani* [1921] 2 AC, at 404-405). In contrast, it may be a community title which is practically ‘equivalent to full ownership’ (*Geita Sebea v Territory of Papua* (1941) 67 CLR at 557 and see *Amodu Tijani* [1921] 2 AC, at 409-410). Even where (from the practical point of view) common law native title approached ‘full ownership’, however, it is subject to three important limitations.

The first limitation ... preclude[s] alienation outside that native system otherwise than by surrender to the Crown ...

The second limitation ... is that the title, whether of individual, family, band or community, is “only a personal ... right” ... and that being so ... it does not constitute a legal or beneficial estate or interest in the actual land ...

The third limitation ... is that common law native title, being merely a personal right ... [is] susceptible of being extinguished by an unqualified grant by the Crown of an estate in fee or of some lesser estate which [is] inconsistent with the rights under the common law native title.⁴²

⁴¹ *Amodu Tijani* [1921] 2 AC 339 at 409-410, as referenced by Deane and Gaudron JJ in *Mabo (No. 2)*, *supra* note 2, at p. 442.

⁴² *Mabo (No. 2)*, *supra* note 2, Deane and Gaudron JJ at pp. 442-443.

Given that these limitations are wholly inconsistent with ‘ordinary’ proprietary interests in land (see chapter 4), it is reasonable to presume that common law native title is best characterized, in the Australia case, as a *sui generis* personal interest in land with possible proprietary aspects.

iii) Relationship Between the Crown’s Title and Native Title

The distinctive source(s) of native title give rise to a unique relationship between the Crown’s title and native title, which is another dimension of the *sui generis* native title identified by both the Supreme Court of Canada and the High Court of Australia. This unique relationship is intimately related to the notion of *radical title*. As Justice Brennan explained in *Mabo (No. 2)*:

The notion of radical title enabled the Crown to become Paramount Lord of all who hold a tenure granted by the Crown and to become absolute beneficial owner of unalienated land required for the Crown’s purposes. But it is not a corollary of the Crown’s acquisition of a radical title to land in an occupied territory that the Crown acquired absolute beneficial ownership of that land to the exclusion of the indigenous inhabitants. If the land were desert and uninhabited, truly a terra nullius, the Crown would take an absolute beneficial title (an allodial title) to the land ... [because] there would be no *other* proprietor. But if the land were occupied by the indigenous inhabitants and their rights and interests in the land are recognised by the common law, the radical title which is acquired with the acquisition of sovereignty cannot itself be taken to confer an absolute beneficial title to the occupied lands.⁴³

In sum, the common law doctrine of tenure applies to every Crown or statutory grant of real property interests (i.e. land rights) in the Crown’s colonies or former colonies, but not to real property interests that do not owe their existence to Crown or statutory grant (i.e. native title).

⁴³ Ibid, Brennan J at p. 425.

In Canada and Australia, then, native title is *sui generis* in the sense that it is a “burden on the Crown’s radical title”⁴⁴, meaning “the Crown’s property in those lands, in pursuance of the common law, [is] reduced or qualified by the burden of the applicable common law native title.”⁴⁵ In practical terms, this means that the Crown cannot exercise effective territorial control over traditional Indigenous territories (i.e. use said territories for its own purposes or grant others the right to use said territories for their own purposes) prior to the lawful extinguishment of native title. Upon the lawful extinguishment of native title, however, the Crown’s *radical title* is elevated to a *plenum dominium* and absolute beneficial title to the lands in question is fully and finally vested in the sovereign Crown.

iv) Alienability

A fourth dimension of *sui generis* native title identified by both the Supreme Court of Canada and the High Court of Australia is its inalienability except by surrender to the Crown.⁴⁶ This distinguishes native title from ‘ordinary’ common law titles, which, being *institutions of* (not merely *recognised by*) the common law, are alienable to third parties. Although the characterization of *sui generis* native title as inalienable is the same in both Canada and Australia, the judicial reasoning supporting this characterization differs as will now be explained.

⁴⁴ See: *Delgamuukw*, *supra* note 1, Lamer CJ at para 145; and, *Mabo (No 2)*, *supra* note, 2, *per* Deane and Gaudron JJ at p. 409; Brennan J at p. 426; and Toohey J at p. 496.

⁴⁵ *Mabo (No2)*, *supra* note 2, *per* Deane and Gaudron JJ at p. 409.

⁴⁶ See: *Delgamuukw*, *supra* note 1, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1014; *per* La Forest and L’Heureux Dubé JJ at p. 1019; Lamer CJ at para 129; and, *Mabo (No 2)*, *supra* note 2, Brennan J at pp. 426 and 430; and, Deane and Gaudron JJ at p. 452.

In Canada, the inalienability of native title is reasoned to be founded on four interrelated basis: 1) the common law principle that ‘ordinary’ common law title is held *of the Crown*; 2) general policy protecting Indigenous land interests; 3) Indigenous perspectives on land; and, 4) an ‘inherent limit’ judicially imposed on native title. As Chief Justice Lamer explained in *Delgamuukw*:

... the inalienability of aboriginal lands is, at least in part, a function of the common law principle that settlers in colonies must derive their title from Crown grant and, therefore, cannot acquire title through purchase from aboriginal inhabitants. It is also, again only in part, a function of a general policy ‘to ensure that Indians are not dispossessed of their entitlements’⁴⁷ ... What the inalienability of land pursuant to aboriginal title suggests is that those lands are more than just a fungible commodity. The relationship between an aboriginal community and the lands over which it has aboriginal title has an important non-economic component. The land has an inherent value in itself, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value.⁴⁸

In Australia, by contrast, the inalienability of native title is reasoned to be derived from: 1) the laws and customs of an Indigenous People; 2) the common law principle that ‘ordinary’ common law titles are held *of the Crown*; and, 3) the common law principle of the right of pre-emption. As Justice Brennan explained in *Mabo (No. 2)*:

[U]nless there are pre-existing laws of a territory over which the Crown acquires sovereignty which provide for the alienation of interests in land to strangers, the rights and interests which constitute a native title can be possessed only by the indigenous inhabitants and their descendants. Native title, though recognized by the common law, is not an institution of the common law and is not alienable by the common law. Its alienability is dependent on the laws from which it is derived.⁴⁹

...

⁴⁷ See: *Mitchel v Peguis Indian Band* [1990] 2 SCR 85, at p. 133.

⁴⁸ *Delgamuukw*, *supra* note 1, Lamer CJ at para 129.

⁴⁹ *Mabo (No 2)*, *supra* note 2, Brennan J at pp. 429-430.

It follows that a right or interest possessed as a native title cannot be acquired from an indigenous people by one who, not being a member of the indigenous people, does not acknowledge their laws and observe their customs; nor can such a right or interest be acquired by a clan, group or member of the indigenous people unless the acquisition is consistent with the laws and customs of that people.⁵⁰

Furthermore, according to Justices Deane and Gaudron:

The first limitation [of native title] relates to alienation. It is commonly expressed as a right of pre-emption in the Sovereign, sometimes said to flow from 'discovery' ... The effect of such a right of pre-emption ... is to preclude alienation outside the native system otherwise than by surrender to the Crown.⁵¹

As evidenced by the above statements, both the Supreme Court of Canada and the High Court of Australia have characterised native title as inalienable, in part, because it is not created by Crown grant. This fact of law makes native title inalienable because all 'ordinary' titles recognised by the common law must be *created* by Crown grant and, therefore, a native title (created other than by Crown grant) alienated to a third party would not give rise to a kind of title that is recognisable at common law and thus defensible under the common law. In other words, a third party to whom a native title was alienated could not defend the title acquired against an adverse claim within the common law system of land holding because s/he could not meet the requisite standard of proof required of native title claimants (see chapter 5).

Native title is also inalienable, according to the Supreme Court of Canada, because historic 'general policy' (i.e. the *Royal Proclamation of 1763*) protects against the unlawful dispossession of traditional Indigenous territories by prohibiting private land

⁵⁰ Ibid, Brennan J at p. 430.

⁵¹ Ibid, Deane and Gaudron JJ at p. 442.

dealings with Indigenous People(s).⁵² Although British Imperial policy on land acquisition in ‘discovered’ territories at the time of Australian colonisation could arguably be translated into a general policy protecting Australia’s Indigenous Peoples from unlawful dispossession, such a policy was certainly not adhered to in Australia (which was treated as a legal *terra nullius* until 1992) and has not been reasoned as a basis of the inalienability of native title in Australian jurisprudence.

The Australian courts have also not reasoned, as the Canadian courts have, that Indigenous perspectives on land imbue land held pursuant to native title with inherent value in and of itself and associated non-economic components which, in part, ground native title’s inalienability (see ‘Content of Native Title’ below). Furthermore, the Australian courts have not interpreted an ‘inherent limit’ as part of the *sui generis* nature of native title which, in the Canadian case, obliges Indigenous communities to preserve native title for the enjoyment and benefit of future generations (see ‘Content of Native Title’ below). According to the majority in *Delgamuukw*, “[t]his inherent limit arises because the relationship of an aboriginal community with its land should not be prevented from continuing into the future.”⁵³ In Canada, then, land held pursuant to native title “cannot be used in a manner that is irreconcilable with the nature of the claimants’ attachment to those lands.”⁵⁴ The Canadian courts have thus reasoned that native title cannot be alienated, in part, because “[a]lienation would bring to an end the entitlement of aboriginal people to occupy the land and would terminate their relationship

⁵² *Delgamuukw*, *supra* note 1, Lamer CJ at para 129. Also see: *Mitchell*, *supra* note 46, p. 133.

⁵³ *Delgamuukw*, *supra* note 1, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1015.

⁵⁴ *Ibid.*

with it.”⁵⁵ As a result, “[i]f aboriginal peoples [in Canada] wish to use their lands in a way that aboriginal title does not permit then they must surrender those lands and convert them into non-[native] title lands to do so.”⁵⁶ This having been said, however, the *Mabo (No.2)* Court’s determination (Justice Dawson dissenting) that “the common law of this country recognises a form of native title, which, in the cases where it has not been extinguished, reflects the entitlement of the indigenous inhabitants, *in accordance with their laws or customs*, to their traditional lands”⁵⁷ (emphasis added) serves to much the same end (i.e. native title holders can not lawfully occupy, use and/or enjoy their traditional territories in a manner(s) contrary to their traditional laws and/or customs).

In the reasoning of Justices Deane and Gaudron in *Mabo (No 2)* the inalienable nature of native title is also grounded, at least in part, in the common law principle of ‘pre-emption’. This principle, sometimes said to flow from ‘discovery’, “precludes alienation outside the native system otherwise than by surrender to the Crown”⁵⁸ thus facilitating colonial settlement and the Crown’s acquisition of a *plenum dominium* in newly acquired territories. Such reasoning in support of the inalienability of native title, though presumably available to Canadian justices, has been absent in their commentary on the nature of native title. Canadian justices’ reference to historic ‘general policy’, however, has served to much the same end.

To conclude the discussion of judicial reasoning on the inalienable nature of native title one last point must be noted with respect to the Australian case. To ground native title’s inalienability, Australian courts (unlike Canadian courts) have referred to

⁵⁵ Ibid, Lamer CJ at para 129.

⁵⁶ Ibid, Lamer CJ at para 131.

⁵⁷ *Mabo (No. 2)*, *supra* note 2, Mason CJ and McHugh J at p. 410.

the *presumed* absence of provisions in pre-existing Indigenous laws and customs that provide for or permit the alienation of land outside an Indigenous community. As explained by Justice Brennan in *Mabo (No. 2)*:

... land in exclusive possession of a indigenous people is not, in any private law sense, alienable property for the laws and customs of an indigenous people *do not generally contemplate* the alienation of the people's traditional land [emphasis added].⁵⁹

Although this reasoning does leave open the *possibility* of native title's alienation other than to the Crown in the Australian case, such a possibility would likely only permit the alienation of native title by one Indigenous party to another Indigenous party, and only if: (i) a pre-existing relationship existed between the two Indigenous parties; *and* (ii) pre-existing land acquisition and divestment laws and/or customs amenable to exogenous alienation could be proven by both Indigenous parties. As explained by Justice Brennan in *Mabo (No. 2)*:

The incidents of a particular native title relating to inheritance, the transmission or acquisition of rights and interests on death or marriage, the transfer of rights and interests in land and the grouping of persons to possess rights and interests in land are matters to be determined by the laws and customs of the indigenous inhabitants ...⁶⁰

In the Canadian case, however, even the possibility of such limited native title alienation remains illusive.

⁵⁸ Ibid, Deane and Gaudron JJ at p. 442.

⁵⁹ Ibid, Brennan J at p. 426.

⁶⁰ Ibid, Brennan J at p. 431. See also: *Lardil Peoples v State of Queensland* [2004] FCA 298 (23 March 2004), which "recognises the succession of land from one group to another provided the transfer occurs under the traditional laws and customs at the time of sovereignty. This was the case with the Gangalidda People who claimed to have succeeded the land of the Mingginda Peoples, who did not survive European contact, under the traditional laws and customs observed by the Gangalidda Peoples at the time of sovereignty. The Court held [at para 131] that the interests of the Gangalidda peoples in respect of those

v) Character of Landholding: Communal and/or Individual?

‘Ordinary’ common law land holdings may be held either individually or communally in accordance with the terms of the entitling Crown or statutory grant. Because native title is held other than by Crown or statutory grant, however, the character of its holding must be derived from its origins in pre-existing indigenous laws and/or customs. As a result, the Supreme Court of Canada has *presumed* that such laws and/or customs treat land as communal property and has thus defined common law native title as a necessarily communal property interest. In the words of Chief Justice Lamer:

Aboriginal title cannot be held by individual aboriginal persons; it is a collective right to land held by all members of an aboriginal nation. Decisions made with respect to that land are also made communally. This is another feature of aboriginal title which is *sui generis* and distinguishes it from normal property interests.⁶¹

It is interesting to note, given the extensive legal reasoning that has accompanied the judicial characterization of native title’s other dimensions, however, that no additional comment or opinion has yet been offered by the Supreme Court of Canada in support of its characterization of native title as a necessarily ‘communal’ property interest.

According to the High Court of Australia, however, native title may be characterized as either a communal or an individual property interest. As Justice Brennan explained in *Mabo (No 2)*: “... indigenous inhabitants in occupation of a territory when sovereignty is acquired by the Crown are capable of enjoying – whether in community, as a group or as individuals – proprietary interests in land ...”⁶²; and later, “... native title ... may be protected by such legal or equitable remedies as are appropriate to the

lands and waters will be recognised and protected ...” [Serica McKay, “[Summary of] *Lardil Peoples v State of Queensland* [2004] FCA 298 (23 March 2004)” *Native Title Newsletter* (March/April 2004), p. 3].

⁶¹ *Delgamuukw*, *supra* note 1, Lamer CJ at para 115.

particular rights and interests established by evidence ... whether possessed by a community, a group or an individual.”⁶³ In the same decision, however, Justices Deane and Gaudron and Justice Toohey characterised native title as ‘communal’ and the rights it generates as belonging to the group as a whole.⁶⁴

The lack of clarity on this point in the Australian case may derive from the limited domestic jurisprudence on native title’s ‘generic’ common law nature. It may also, however, derive from the absence of any clear distinction between free-standing ‘aboriginal rights’ and self-embodied ‘native title’ in the Australian case.

vi) *Aboriginal Rights vs Native Title*

In *R v Adams* [1996]⁶⁵ and the companion decision *R v Côté* [1996]⁶⁶ Chief Justice Lamer of the Supreme Court of Canada held “that aboriginal title was a distinct species of aboriginal rights that was recognised and affirmed by s. 35(1) [of the *Constitution Act, 1982*].”⁶⁷ Although rather lengthy, Chief Justice Lamer’s explanation of this point in *Adams* summarily captures the Supreme Court’s intricate reasoning on this point and thus merits citation in full:

In *Van der Peet*⁶⁸, at para. 43, aboriginal rights were said to be best understood as: ... first the means by which the constitution recognizes the fact that prior to the arrival of Europeans in North America the land was already occupied by distinctive aboriginal societies, and as, second, the means by which that prior occupation is reconciled with the assertion of Crown sovereignty over Canadian territory.

⁶² *Mabo (No 2)*, *supra* note 2, Brennan J at p. 426.

⁶³ *Ibid*, Brennan J at p. 430.

⁶⁴ See: *Mabo (No 2)*, *supra* note 2, Deane and Gaudron JJ at p. 452; and. Toohey J at p. 428.

⁶⁵ *R v Adams* [1996] 3 SCR 101.

⁶⁶ *R v Côté* [1996] 3 SCR 139.

⁶⁷ *Delgamuukw*, *supra* note 1, as referenced by Lamer CJ at para 2.

⁶⁸ *R. v Van der Peet* [1996] 2 SCR 507.

From this basis the Court went on to hold, at para. 46, that aboriginal rights are identified through the following test: ... in order to be an aboriginal right an activity must be an element of a practice, custom or tradition integral to the distinctive culture of the aboriginal group claiming the right.

What this test, along with the conceptual basis which underlies it, indicates, is that while claims to Aboriginal title fall within the conceptual framework of Aboriginal rights, Aboriginal rights do not exist solely where a claim to Aboriginal title has been made out. Where an Aboriginal group has shown that a particular practice, custom or tradition taking place on the land was integral to the distinctive culture of that group then, *even if they have not shown that their occupation and use of the land was sufficient to support a claim of title to the land*, they will have demonstrated that they have an Aboriginal right to engage in that practice, custom or tradition. The *Van der Peet* test protects activities which were integral to the distinctive culture of the aboriginal group claiming the right; it does not require that the group satisfy the further hurdle of demonstrating that their connection with the piece of land on which the activity was taking place was of a central significance to their distinctive culture sufficient to make out a claim to aboriginal title to the land. *Van der Peet* establishes that s. 35 recognizes and affirms the rights of those peoples who occupied North America prior to the arrival of the Europeans; that recognition and affirmation is not limited to those circumstances where an aboriginal group's relationship with the land is of a kind sufficient to establish title to the land.

To understand why aboriginal rights cannot be inexorably linked to aboriginal title it is only necessary to recall that some aboriginal peoples were nomadic, varying the location of their settlements with the season and changing circumstances. That this was the case does not alter the fact that nomadic peoples survived through reliance on the land prior to contact with Europeans and further, that many of the practices, customs and traditions of nomadic peoples that took place on the land were integral to their distinctive cultures. The aboriginal rights recognized and affirmed by s. 35(1) should not be understood or defined in a manner which excludes some of the provisions it was intended to protect [emphasis original].⁶⁹

In *Delgamuukw* the majority of the court expanded on this distinction between aboriginal rights and native title in the following manner:

⁶⁹ *R. v Adams*, *supra* note 64, Lamer CJ at paras 26-27.

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At one end are those aboriginal rights which are practices, customs and traditions integral to the distinctive aboriginal culture of the group claiming the right but where the use and occupation of the land taking place is not sufficient to support a claim of title to land. In the middle are activities which, out of necessity, take place on land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the rights to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures. Site-specific rights can be made out even if title cannot. Because aboriginal rights can vary with respect to their degree of connection with the land, some aboriginal groups may be unable to make out a claim to title, but will nevertheless possess aboriginal rights that are recognizable and affirmed by s. 35(1), including site-specific rights to engage in particular activities.⁷⁰

In sum, the distinction between native title and aboriginal rights in the Canadian case arises from the Supreme Court's flexible approach to s 35(1) of the *Constitution Act, 1982*, which recognizes and affirms 'aboriginal and treaty rights' (see chapter 2), permitting native title to be subsumed by the language of the section. The implication of this distinction between self-embodied native title and free-standing aboriginal rights, however, "does not mean that the connection of some rights to the land is insignificant, such as in the case of a site specific hunting right. What it does mean is that a claim to an Aboriginal right is not necessarily dependent on a successful claim to [native] title."⁷¹ In other words, distinguishing between aboriginal rights and native title "enables the court

⁷⁰ *Delgamuukw*, *supra* note 1, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1016.

⁷¹ Catherine Bell, "New Directions in the Law of Aboriginal Rights", *Canadian Bar Review*, 77:1&2 (March-June 1998), p. 56.

to apply more flexible criteria to proof of [native] title [and aboriginal rights] claims”⁷² (see chapter 5).

In Australia, by contrast, no similar distinction has yet been made between ‘aboriginal rights’ and ‘native title’. Instead the concept of ‘aboriginal rights’ seems to be subsumed by the concept of ‘native title’. As was explained by Justice Brennan in *Mabo (No. 2)*:

... where an indigenous people (including a clan or group), as a community are in possession of land under a proprietary [sic] native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights and interests are, so to speak, carved out of the communal native title. A sub-group or individual asserting a native title dependent on a communal native title has a sufficient interest to sue to enforce or protect communal native title. A communal native title enures for the benefit of the community as a whole and for the sub-groups and individuals within it who have particular rights and interests in the community’s lands.⁷³

The logical implication of this lack of distinction between free-standing aboriginal rights and self-embodied native title in the Australian case is that that ‘aboriginal rights’ short of native title have no legal standing (or at least no *independent* legal standing) in Australian common law. Although this conclusion may be criticized for relying too heavily on the unique constitutional recognition afforded aboriginal rights and native title in the Canadian case, the High Court of Australia’s recent determination in *Ward v Western Australia* (2002)⁷⁴ that native title is best characterized as a ‘bundle of rights’⁷⁵

⁷² Ibid, p. 59.

⁷³ *Mabo (No 2)*, *supra* note 2, Brennan at p. 431.

⁷⁴ *Western Australia v Ward* [2002] HCA 28.

⁷⁵ See: *Western Australia*, *supra* note 73, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.

(see chapter 4) and the lack of distinctive proof criteria for aboriginal rights and native title in the Australian case (see chapter 5) add considerable additional weight to this analysis of native title's legal nature.

vii) Revival

The final dimension of *sui generis* native title addressed by the Supreme Court of Canada and High Court of Australia relates to the question of revival; that being: can native title resume a common law existence after being extinguished or suspended?

Although the Supreme Court of Canada has not addressed the question of revival directly, the finding of the majority in *Delgamuukw* that “[a]n *unbroken chain* of continuity need not be established between present and prior occupation”⁷⁶ (emphasis added) in order to prove a native title claim leaves open the possibility that native title can be revived after, or more precisely cannot be ‘lost’ due to, temporary gaps in physical occupation (the fact of which grounds native title in common law in Canada, at least in part). (See chapter 4).

In *Mabo (No 2)* and *Wik*, however, the High Court of Australia did address the question of revival directly and decided in the negative. As Justice Brennan asserted in *Mabo (No 2)*: “[a] native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition ... Once traditional native title expires, the Crown's radical title expands to a full beneficial title, for then there is no other proprietor than the Crown.”⁷⁷ In the subsequent *Wik* decision Justice

⁷⁶ *Delgamuukw*, *supra* note 1, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1016.

⁷⁷ *Mabo (No. 2)*, *supra* note 2, Brennan J at p. 430.

Brennan also asserted that native title can not be revived following valid extinguishment (i.e. by inconsistent grant).⁷⁸

To summarize the High Court's legal reasoning on this question, when native title is lost (through the abandoning of traditional laws and/or customs) or extinguished (by valid acts of government) the Crown's radical title expands to a *plenum dominium* and all interests in land are subsequently recognized as being held either *by* or *of* the Crown (see Figures 6 [above] and Figure 8 [below]). This is because once a *plenum dominium* or unqualified beneficial title is vested in the Crown there is necessarily no other proprietor but the Crown recognised by the common law until the Crown divests tenure in another proprietor. To explain this point further, because native title is not *created* by the Crown it is incapable of revival *by* the Crown for the simple reason that any action by the Crown would necessarily *create* an 'ordinary' common law title with the Crown as its source. In sum, it is logically impossible for the Crown to create a *sui generis* title (such as native title) whose source is other than the Crown (i.e. prior occupancy or indigenous laws and customs).

Though the Canadian courts have not considered the matter of native title revival directly, the legal reasoning just explained is equally applicable to the Canadian case in principle. This legal reasoning, which is grounded in the feudal system of land tenure developed in medieval England, may seem contrived but as Justice Brennan asserted in

⁷⁸ *Wik*, *supra* note 3, Brennan J at p. 160 (dissenting opinion on a different matter).

Mabo (No 2): “It is far too late in the day to contemplate an allodial or other system of land ownership.”⁷⁹

III – THE CONTENT OF NATIVE TITLE

Like the nature of native title, the content of native title depends to a large degree on the source of native title. As a result, in Canada the content of native title is a matter of *law* (and thus amenable to general statement and reasoning) while in Australia the content of native title is a matter of *fact* (and thus adverse to general statement and reasoning). This leaves the content of native title rather elusive in the Australian case.

A - Canada

Prior to the Supreme Court of Canada’s decision in *Delgamuukw*, the content of native title remained undefined in Canadian law. As explained by Chief Justice Lamer:

Although cases involving aboriginal title have come before this Court and Privy Council before, there has never been a definitive statement from either court on the *content* of aboriginal title. In *St. Catherine’s Milling*, the Privy Council ... described the aboriginal title as a ‘personal and usufructuary right’, but declined to explain what that meant because it was not ‘necessary to express any opinion upon the point’ (at p. 55). Similarly, in *Calder, Guerin*^[80] and *Paul*^[81] ... the content of title was not at issue and was not directly addressed [emphasis original].⁸²

⁷⁹ *Mabo (No. 2)*, *supra* note 2, Brennan J at p. 425. An ‘allodial’ system of land ownership recognizes land ownership that is unfettered, outright, absolute and ‘free’, meaning: without obligations to another (i.e. a lord).

⁸⁰ *Guerin v The Queen* [1984] 2 SCR 335. This case dealt with the Musqueam Indian Band’s claim that the federal government had breached its trust and fiduciary obligations to the band when it leased band land to a golf club for terms less favourable than those initially disclosed.

⁸¹ *Canadian Pacific Limited v Paul* [1988] 2 SCR 654.

⁸² *Delgamuukw*, *supra* note 1, Lamer CJ at para. 116.

The *Delgamuukw* justices thus broke new ground when they determined that “aboriginal title encompasses the right to *exclusive use and occupation* of the land held pursuant to native title for a variety of purposes, which need not be aspects of those aboriginal practices, customs and traditions which are integral to the distinctive aboriginal cultures” (emphasis added).⁸³ This means that native title holders have the right to permit and/or prevent others from entering, using, occupying and/or otherwise enjoying their traditional territories. It also means that they have the right to choose to what uses their lands can be put. As Chief Justice Lamer explain in *Delgamuukw*:

Aboriginal title is a right in land and, as such, is more than the right to engage in specific activities which may be themselves aboriginal rights. Rather it confers the right to use land for a variety of activities, not all of which need be aspects of practices, customs and traditions which are integral to the distinctive cultures of aboriginal societies. These activities do not constitute the right *per se*, rather, they are parasitic on the underlying title.⁸⁴

And as the majority asserted in the same:

The exclusive right to use the land is not restricted to the right to engage in activities which are aspects of aboriginal practices, customs and traditions integral to the claimants group’s distinctive aboriginal culture. Canadian jurisprudence frames the ‘right to occupy and possess’ in broad terms and significantly, is not qualified by the restriction that use be tied to practice, custom or tradition.⁸⁵

For example, the majority justices in *Delgamuukw* determined that “aboriginal title encompasses mineral rights and [that] lands held pursuant to aboriginal title should be capable of exploitation.”⁸⁶ This determination was based, at least in part, on the

⁸³ Ibid, *per* Lamer CJ and Cory, McLachlin and Major JJ. Also see: Lamer CJ at paras 116, 118-124 and 166 in the same.

⁸⁴ Ibid, Lamer CJ at para 111.

⁸⁵ Ibid, *per* Lamer CJ and Cory, McLachlin and Major JJ.

⁸⁶ Ibid, *per* Lamer CJ and Cory, McLachlin and Major. Also see: Lamer CJ at para 122 in the same.

Indian Oil and Gas Act, 1985, which “provide[s] for the exploration of oil and gas on reserve land through their surrender to the Crown.”⁸⁷ As was explained by Chief Justice Lamer in *Delgamuukw*:

The statute presumes that the aboriginal interest in reserve land [which is the same as the aboriginal interest in non-reserve land⁸⁸] includes mineral rights, a point which this Court unanimously accepted with respect to the *Indian Act* in *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344. On the basis of *Guerin*, aboriginal title also encompasses mineral rights, and lands held pursuant to aboriginal title should be capable of exploitation in the same way, which is certainly not a traditional use for those lands. This conclusion is reinforced by s. 6(2) of the [*Indian Oil and Gas Act*], which provides:

(2) Nothing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled.⁸⁹

In sum, the *Delgamuukw* justices confirmed that native title encompasses a wide range of rights and interests, including the right to subsurface resources (e.g. minerals, gems, oil, and natural gas) as well as the ability to exploit them.

At the same time, however, the *Delgamuukw* justices also determined that “the range of uses [protected by native title] is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land from which forms the basis of the particular group’s aboriginal title.”⁹⁰ This is because, the lands held pursuant to native title “are more than just a fungible commodity.”⁹¹ As Chief Justice Lamer explained in his reasons for judgement on this matter:

⁸⁷ Ibid, Lamer CJ at para 122.

⁸⁸ See: *Guerin*, *supra* note 79, Dickson J at p. 379

⁸⁹ *Delgamuukw*, *supra* note 1, Lamer CJ at para 122.

⁹⁰ Ibid, Lamer CJ at para 111. Also see: Lamer CJ at paras 117 and 166 in the same.

⁹¹ Ibid, Lamer CJ at para. 129.

The relationship between an aboriginal community and the lands over which it has aboriginal title has *an important non-economic component*. The land has *an inherent and unique value in itself*, which is enjoyed by the community with aboriginal title to it. The community cannot put the land to uses which would destroy that value [emphasis added].⁹²

And later:

[T]he law of native title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

... The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.⁹³

In sum, the ‘inherent limit’ “flows from the definition of aboriginal title as a *sui generis* interest in land, and is one way in which aboriginal title is distinct from a [title in] fee simple.”⁹⁴ As a result, “[i]f aboriginal peoples wish to use their lands in a way that aboriginal title does not permit, then they must surrender those lands [to the Crown, ‘in exchange for valuable consideration’⁹⁵,] and convert them into non-[native] title lands to do so.”⁹⁶

⁹² Ibid, Lamer CJ at para. 129.

⁹³ Ibid, Lamer CJ at para 126.

⁹⁴ Ibid, Lamer CJ at para 111. Also see: Lamer CJ at paras 117 and 166 in the same.

⁹⁵ Ibid, Lamer CJ at para 131.

B - Australia

In the Australia, by contrast, the Courts have offered very little insight into the content of native title. This is because the content of native title (like the nature of native title) has been determined to flow from the traditional laws and/or customs that give rise to native title in the first place. As Justices Deane and Gaudron explained in *Mabo (No. 2)*: “Since the [native] title preserves entitlement to use or enjoy under the traditional law or custom of the relevant territory or locality, the contents of the rights and the identity of those entitled to enjoy them must be ascertained by reference to that traditional law or customs.”⁹⁷ And as Justice Toohey asserted in the same: “[t]he content of the interest protected [by native title] is that which already exists traditionally ...”⁹⁸

As a result, excepting the High Court of Australia’s declaration in *Mabo (No. 2)* that “the Meriam people are entitled as against the whole world to possession, occupation, use and enjoyment of the island of Mer”⁹⁹, (which suggests that native title *can* encompass the right(s) of ‘possession’, ‘occupation’, ‘use’ and/or ‘enjoyment’) and Justices Deane and Gaudron’s assertion in the same that “the rights of occupation or use under common law native title can themselves constitute valuable property”¹⁰⁰ (which suggests that native title *can* have an economic component and/or inherent value), there has been no comment from the High Court of Australia on the content of native title. As explained by Justices Deane and Gaudron in *Mabo (No. 2)*:

⁹⁶ Ibid.

⁹⁷ *Mabo (No. 2)*, *supra* note 2, Deane and Gaudron JJ at p. 452.

⁹⁸ Ibid, Toohey J at p. 486. Also see: Mason CJ and McHugh at p. 410; Brennan J at pp. 429 and 434-435; and, Deane and Gaudron JJ at pp. 442 in the same.

⁹⁹ Ibid, Brennan J at p. 437.

¹⁰⁰ Ibid, Deane and Gaudron JJ at p. 453.

The content of ... common law native title will, of course, vary according to the extent of the pre-existing interest of the relevant individual, group or community. It may be an entitlement of an individual, through his or her family, band or tribe, to a limited special use of land in a context where notions of property in land and distinctions between ownership, possession and use are all but unknown ... In contrast, it may be a community title which is practically 'equivalent to full ownership' ...¹⁰¹

Or as Frank Brennan amusingly put it:

[In *Mabo (No. 2)*] [t]he High Court ... affirmed that the Murray Islands were akin to a Monopoly Board. There are players and they have rules which determine rights and interests in land. But the court [is] not in a position to inquire into those rules and their application. The court [is] simply saying that the common law of [Australia] recognises that there is a Monopoly Board, there are native players, they are playing according to their own rules, and may continue to do so until the sovereign power comes in and upsets the Monopoly Board. The rights and interests that exist on that Monopoly Board are determined by the local system of laws and customs.¹⁰²

According to Frank Brennan, however, “[t]he most critical question is not whether the squares on native Monopoly are held individually or communally, but whether the native players have rights to ownership and control of the squares on the board and not just a right to be on the board.”¹⁰³

¹⁰¹ Ibid, Dean and Gaudron JJ at p. 442.

¹⁰² F. Brennan, “Mabo: options for implementation – statutory registration and claims processes”, in *Mabo and Native Title: Origins and Institutional Implications*, Will Sanders (ed), CAEPR Research Monograph No. 7 (Canberra: CAEPR – ANU, 1994), p. 35.

¹⁰³ Ibid, p. 36.

CONCLUSION

In response to their historic and contemporary dispossession, the Indigenous Peoples of Canada and Australia have fought for and attained common law recognition of their unique rights and claims to land. As this chapter on the judicial characterization of native title's source, nature and content has begun to reveal, however, the judicial accommodation of native title within the common law system of land holding has produced a relatively stronger common law right/claim to land in the Canadian case than it has in the Australian case (see Figure 8).

This finding not only belies the commonly held assumption that established common law principles will produce similar outcomes when applied to similar cases (and there are few common law principles that are as well established as those relating to real property rights and claims), it also provides significant evidence in support of the self-reinforcing path dependent thesis (that being that the initial and historically contingent recognition and accommodation of indigenous rights to land has strongly influenced (if not determined) the legal and political accommodation of native title in the post-common law recognition era).

Figure 8 – Native Title’s Approximate Placement Within the Hierarchy of ‘Ordinary’ Common Law Land Holdings

	Source	Nature	Content	Vulnerability
Plenum Dominium (also termed ‘royal demesne’)	Crown sovereignty (i.e. Crown acquisition of land by cession, surrender or conquest; or Crown acquisition of land classified as ‘ <i>terra nullius</i> ’)	Unqualified paramount title held <i>by</i> the Crown (i.e. unqualified legal and equitable proprietary right to all real property within the Crown’s sovereign jurisdiction)	Imparts absolute beneficial ownership of the land itself	Can only be extinguished by cession or conquest Can not be infringed without Crown consent
Radical Title (also termed ‘underlying title’)	Crown sovereignty (i.e. Crown acquisition of land not classified as ‘ <i>terra nullius</i> ’/ land occupied by indigenous inhabitants)	Qualified paramount title held <i>by</i> the Crown (i.e. legal and equitable proprietary right to all real property within the Crown’s sovereign jurisdiction subject to or burdened by pre-existing rights to the same land)	Imparts final or underlying beneficial ownership of the land itself (i.e. when radical title is ‘unburdened’ by the extinguishment of native title, the Crown’s title is elevated to a <i>plenum dominium</i>)	Can only be extinguished by cession surrender or conquest Can not be infringed without Crown consent
Proprietary Tenure (also termed ‘common law estate’, ‘proprietary estate’, ‘common law title’ or ‘equitable estate’)	Crown grant of legal title (i.e. constructive possession); or statutory grant of legal title (i.e. title derived through adverse, exclusive, hostile or peaceable possession)	Unqualified legal and equitable proprietary right to delineated tracts of land held <i>of</i> the Crown (e.g. title in fee simple)	Legally imparts beneficial tenure of the land Practically imparts full beneficial ownership of the land itself	Can be extinguished by inconsistent Crown or statutory grant but not without notice and equitable relief (i.e. compensation) or consent of the lawful proprietor
Native Title (Canada)	Prior occupancy (primary source); Indigenous laws and customs; recognition (not creation) by the <i>Royal Proclamation of 1763</i>	Qualified legal and equitable proprietary tenure (i.e. <i>sui generis</i> proprietary tenure that is ‘personal’ only in the sense that it is inalienable except to the Crown)	Imparts qualified beneficial tenure of the land itself	<u>Sovereignty to 1982:</u> could be extinguished by ordinary federal legislation revealing a ‘clear and plain intention’ to extinguish native title <u>1982 to Present:</u> can not be extinguished without the consent of native title holders

Figure 8 (cont.)

	Source	Nature	Content	Vulnerability
Native Title (Australia)	Indigenous laws and customs (primary source); prior occupation/use; (exclusive) possession derived from Indigenous laws and customs	Qualified legal and non-equitable personal interest (i.e. <i>sui generis</i> personal interest that may have some proprietary aspects)	Imparts a continuing right to use, enjoy, occupy and/or possess land in accordance with the Indigenous laws and customs that gave rise to the prior (and continuing) use, enjoyment, occupation and/or possession	Can be extinguished by: (i) 'valid' Commonwealth, State and Territorial legislation that reveals a clear and plain intention or uses clear and unambiguous words to extinguish native title; (ii) 'valid' Commonwealth, State and Territorial legislation that by necessary statutory implication extinguishes native title; (iii) inconsistent statutory grants to third parties; (iv) Crown appropriations; (v) loss of native title holders' connection to the land through the abandonment of Indigenous laws and customs; and/or, (vi) the extinction of the relevant Indigenous clan or group
Personal Interest (also termed a 'derivative right')	Crown or statutory grant of legal, beneficial, possessory and/or other (i.e. non-beneficial) interests in land	Qualified legal and non-equitable personal (i.e. non-proprietary) right to delineated tracts of land held of the Crown (e.g. leasehold tenures)	Imparts qualified beneficial interests in the land (e.g. a forestry lease) or qualified non-beneficial interests in the land (e.g. the public's right to use, access and/or enjoy Crown land)	<u>As a qualified beneficial interest:</u> can only be extinguished and/or infringed by inconsistent Crown or statutory grant in accordance with the terms of the entitling legal instrument (e.g. the terms of the relevant lease) <u>As a qualified non-beneficial interest:</u> can be extinguished and/or infringed at the will of the Crown

In sum, while the initial and historically contingent recognition and accommodation of indigenous rights to land in the Canadian case (based on an underlying assumption that Indigenous Peoples were potential [if not actual] land ‘owners’) has produced a judicial characterization of native title as a *sui generis* proprietary right to land, the initial recognition and accommodation of indigenous rights to land in the Australian case (based on an underlying assumption that Indigenous Peoples were [at most] potential land users) has produced a judicial characterization of native title as a *sui generis* personal interest.¹⁰⁴

As the following chapters will now demonstrate, these characterizations of native title have significantly affected native title’s vulnerability to extinguishment and infringement (see chapter 4), its proof criteria (see chapter 5) and the manner in which it has been formally accommodated in central government policy (chapters 6 and 7).

¹⁰⁴ According to Frank Brennan, “Even though native title provides less security and fewer rights than a statutory title which grants inalienable freehold (i.e. title with all the incidents of freehold except that the owners cannot sell it or give it away and the Crown cannot extinguish title except with specific statutory approval), there are many Aborigines and Torres Strait Islanders attracted by the symbolism of native title as recognised by the High Court. For them, it is important that the title is not granted or given by the Crown but is recognised by the courts as having preceded colonisation and as having survived the assertion of sovereignty by foreigners.” [Frank Brennan SJ, “Mabo and Its Implications for Aborigines and Torres Strait Islanders” in *Mabo: A Judicial Revolution – The Aboriginal Land Rights Decision and Its Impact on Australian Law*, M.A. Stephenson and Suri Ratnapala (eds), (St. Lucia: University of Queensland Press, 1993), p. 42].

CHAPTER 4

NATIVE TITLE’S VULNERABILITY TO EXTINGUISHMENT AND INFRINGEMENT

As explained in chapter 3, the common law recognises four general types of land holding – ‘plenum dominium’, ‘radical title’, ‘proprietary tenure’ and ‘personal interest’ (see chapter 3, Figure 6). Each of these ‘ordinary’ common law land holdings can be legally extinguished and/or infringed (i.e. limited) and thus each can be described as ‘vulnerable at common law’. The degree of vulnerability associated with each type of land holding is a matter of established law, with vulnerability increasing as titles descend within the hierarchy of ‘ordinary’ common law land holdings (see Figure 9).

Figure 9 – Vulnerability of ‘Ordinary’ Common Law Land Holdings

	Plenum Dominium	Radical Title	Proprietary Tenure	Personal Interest
Vulnerability to Extinguishment and Infringement	Can only be extinguished by cession, surrender or conquest Can not be infringed without Crown consent	Can only be extinguished by cession, surrender or conquest Can not be infringed without Crown consent	Can be extinguished by inconsistent Crown or statutory grant but not without notice and equitable relief (i.e. compensation) or the consent of the lawful proprietor	<u>As a qualified beneficial interest:</u> can be extinguished and/or infringed by inconsistent Crown or statutory grant in accordance with the terms of the entitling legal instrument (e.g. lease) <u>As a qualified non-beneficial interest:</u> can be extinguished and/or infringed at the will of the Crown

For present purposes it will suffice to elaborate upon the vulnerability of ‘ordinary’ proprietary tenures and personal interests.

According to established legal principles, an ‘ordinary’ proprietary tenure (such as a title in fee simple) can not be ‘wrongfully’ (meaning without notice and equitable relief or consent) extinguished and/or infringed by subsequent executive or legislative action and is legally defensible against all other claims to the land. In other words, to effect the lawful extinguishment and/or infringement of an ‘ordinary’ proprietary tenure, the appropriate executive or legislative authority must: (i) inform the title holder of its intention to expropriate/trespass upon the lands in question; and (ii) either compensate the title holder for his/her loss or secure his/her approval for the expropriation/trespass.

Furthermore, because the common law recognizes a proprietary tenure as the best legal claim to land and will thus defend it against all other claims, only the Crown (which holds the ‘ultimate’ title to all lands), can legally extinguish and/or infringe upon a proprietary tenure. In short, the Crown (now embodied in the executive and legislative authorities of the Commonwealth states) or the Crown in right of a Province/State (according constitutional jurisdiction) can lawfully extinguish and/or infringe upon an ordinary proprietary tenure (or expropriate all or some of the lands held pursuant thereto) either by stating or expressly implying its intention to do so or by effectively preventing the holder of the proprietary tenure from exercising his/her proprietary rights. The former occurs when an appropriate executive or legislative law or act explicitly, necessarily and/or unambiguously demonstrates the relevant authority’s intention to extinguish and/or infringe upon a proprietary tenure. The latter occurs when the appropriate executive or legislative law or act permits land held pursuant to a proprietary

tenure to be used in a manner 'inconsistent' with the exclusive use and occupancy rights of the proprietary tenure holder, for example by permitting the land to be used for a public purpose (i.e. the construction of a highway). Whether an 'ordinary' proprietary tenure is extinguished/infringed directly or by inconsistent grant, however, notice and consent or 'equitable relief' (i.e. compensation) are required to give lawful effect to the extinguishment/infringement.

A personal interest (i.e. a usufructuary right), by contrast, may be legally extinguished or infringed by the Crown or the Crown in right of a Province/State without notice and without consent and/or compensation at the will of the Crown, subject only to such limiting provisos as may exist in any existing entitling lease or grant. For example, the relevant legislative authority may revoke the right of previously entitled individuals to camp in a national or provincial park without prior notice of its intention to restrict camping and without compensating the would-be campers. This makes 'ordinary' personal interests much more vulnerable to extinguishment/infringement than 'ordinary' proprietary tenures at common law.

As this chapter will now explain, the judicial characterization of native title as a *sui generis* proprietary tenure, derived from the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners, in the Canadian case, and the judicial characterization of native title as a *sui generis* personal interests (with possible proprietary aspects), derived from the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users, in the Australian case, have significantly influenced both native title's vulnerability to

extinguishment and infringement and native title holder's ability to secure equitable relief in the wake of native title extinguishment/infringement.

I – THE VULNERABILITY OF NATIVE TITLE IN CANADA

As was explained in chapter 2, an 'ordinary' proprietary interest, 'tenure' or 'title' constitutes a legal or beneficial estate or an equitable interest in the actual land at common law. As a result, a proprietary interest in land encompasses more than just site-specific rights to engage in certain activities on the land (i.e. to exercise 'personal' or 'usufructuary' rights) and is normally equated with a common law equitable estate in fee simple, or 'full ownership' (the highest form of land 'tenure', 'title' or 'ownership' recognised under the land law of England, from which Canadian and Australian property law is derived). Although native title "is not equated with fee simple ownership; nor can it be described with reference to traditional property law concepts"¹, according to the Supreme Court's judgement and reasoning in *Delgamuukw*, native title is a "right to the land itself"² and it is only 'personal' in the sense that it cannot be 'alienated' (transferred, sold or surrendered) to anyone other than the Crown³.

This description of native title clearly imbues it with a 'proprietary' character in the Canadian case. In other words, falling somewhere between an 'ordinary' proprietary interest and an 'ordinary' personal interest in the hierarchy of 'ordinary' common law land holdings, *sui generis* native title is more akin to the former than to the later (see chapter 3, Figure 8). Its vulnerability at common law has thus been influenced by the

¹ *Delgamuukw v British Columbia* [1997] 3 SCR 1010, *per* La Forest and L'Heureux Dubé JJ; see also Brennan J at para 112 in the same.

² *Ibid*, *per* Lamer CJ and Cory, McLachlin and Major JJ.

established vulnerability principles of ‘ordinary’ proprietary interests, making it relatively less vulnerable to extinguishment in the Canadian case than it is in the Australian case.

In considering the legal vulnerability of native title in the Canadian case, two time periods must be considered: (1) sovereignty to 1982, during which time native title was protected only by the common law; and, (2) 1982 to the present, during which time native title was, and remains, protected by a constitutional enactment.

i) Sovereignty to 1982

Prior to 1982 native title could be extinguished either through ‘voluntary surrender’ or by ‘ordinary federal legislation’ revealing a ‘clear and plain intention’ to extinguish native title. Each of these categories of lawful extinguishment will now be discussed in turn, followed by a discussion of both the jurisdiction to extinguish native title during the pre-1982 period as well as the right to compensation that may or may not be owing to Indigenous Peoples who suffered unlawful territorial dispossession in the pre-1982 period.

a) Voluntary Surrender

The pre-1982 extinguishment of native title by ‘voluntary surrender’ required nothing more than the informed consent of Indigenous Peoples and was practically effected through the conclusion of negotiated treaty agreements. Generally speaking, the conclusion of treaties (both historic and modern) has required native title holders to agree to ‘cede, surrender and release’ their native title rights to the Crown in exchange for:

³ See: *Delgamuukw*, supra note 1, per La Forest and L’Heureux Dubé JJ; and Lamer CJ at para 113.

reserved lands (in the case of historic treaties) or settlement areas (in the case of modern treaties); monetary payments; annuities; gifts; and/or, other forms compensation.⁴ Although compensation has never been a legal requirement of extinguishment by ‘voluntary surrender’, Canada’s historic and modern treaties have all included some form of compensation or payment in exchange for the voluntary surrender of native title interests. The only legal requirement of extinguishment by ‘voluntary surrender’, however, is the informed consent of the native title holders involved.

b) Ordinary (Federal) Legislation

Prior to 1982, native title could also be extinguished and/or infringed without Indigenous consent through the enactment of ‘ordinary legislation’. This is because native title (like ‘ordinary’ common law land rights) was weaker than the prerogative rights of the Crown during the pre-1982 period. The legitimate expression of common law native title, therefore, could not survive in the face of conflicting legislation passed by the appropriate legislative body (i.e. the federal government, as will be explained below). As Justice Mahoney stated in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979]⁵: “Once a statute has been validly enacted, it must be given effect. If its necessary effect is to abridge or entirely abrogate a common law right,

⁴ The ‘blanket extinguishment’ of native title and other aboriginal rights in exchange for ‘defined’ settlement areas and ‘defined’ rights has traditionally been a central feature of land claims settlements in the Canadian case. This changed in 1986 when the federal government revised its comprehensive claims policy (the policy which has governed modern treaty settlements since its implementation in 1973). The revised policy allows for the retention of native title and aboriginal rights on land which Indigenous Peoples will hold following the conclusion of a claim settlement, to the extent that such rights are not inconsistent with the settlement agreement. The revised policy also ensures that any aboriginal rights that are unrelated to land will not be affected by any given modern treaty settlement. (See chapters 6 and 7).

⁵ *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 3 CNLR 17.

then that is the effect that the Courts must give it. That is as true of an aboriginal right as of any other common law right.”⁶

Although specific extinguishment and/or infringement legislation was not required to effect the legislative extinguishment and/or infringement of native title during the pre-1982 period, purported extinguishing/infringing legislation was required to evince a ‘clear and plain’ legislative intent to extinguish/infringe native title to be lawful.⁷ As Chief Justice Lamer explained in *Delgamuukw*, “While the requirement of clear and plain intent does not, perhaps, require that the Crown ‘use language which refers expressly to its extinguishment of aboriginal rights’ (*Gladstone, supra*, at para 34)^[8], the standard is still quite high.”⁹ According to this standard, legislation enacted prior to 1982 which merely regulated native title (for example: general ‘Crown lands’ legislation or the reservation of land by the Crown for a public purpose) could not have effectively extinguished native title, even though such legislation may have been ‘necessarily inconsistent’ with native title.¹⁰

‘Necessarily inconsistent’ legislation abridges or abrogates native title by permitting land uses or creating third party rights that prevent native title holders from being able to exercise (partially or wholly) their common law native title rights. For example, the creation of a national park may prevent native title holders from excluding others from their territory or controlling others’ use of the land but may still permit the same native title holders to traverse, live on, and/or use the land for their own purposes

⁶ Ibid, Mahoney at p. 55.

⁷ See: *Calder v Attorney General of British Columbia* [1973] SCR 313, Hall J at p. 404; *Hamlet of Baker Lake, supra* note 5, Mahoney at p. 56; *R. v. Sparrow* [1990] 3 CNLR 160, *per* Dickson and La Forest .

⁸ See: *R v Gladstone*, [1996] 3 SCR 139.

⁹ *Delgamuukw, supra* note 1, Lamer CJ at para 180.

(partial impairment). In another case, the construction of a highway on Crown appropriated native title land may prevent native title holders from exercising any native title rights whatsoever over the land in question (wholesale impairment). Although the Canadian courts have yet to specifically address this issue, established common law principles make it reasonable to presume that native title abridged or abrogated by ‘necessarily inconsistent’ legislation is effectively suspended, (to the extent of inconsistency with the legislation in question), until such time as it may be resumed. In sum, native title may be rendered inoperative, but may not be lawfully extinguished, by ‘necessarily inconsistent ordinary legislation’ passed prior to 1982. Practically, however, the wholesale impairment of native title effected by ‘necessarily inconsistent ordinary legislation’ passed prior to 1982 may project so far into the future as to result in the *de facto* extinguishment of native title in certain cases.

When ‘necessarily inconsistent legislation’ takes the form of a Crown grant of title in fee simple, however, the legal effects on native title are even more ambiguous. As Oosterhof and Rayner explain:

The fee simple title is the largest estate or interest known in the law and is the most absolute in terms of the rights which it confers. It permits the owner to exercise every conceivable act of ownership upon it or with respect to it ... while technically the owner holds of the Crown under the doctrine of tenure, in practice his [or her] ownership is the equivalent of the absolute dominion a person may have or obtain.¹¹

¹⁰ See: *Delgamuukw*, *supra* note 1, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer CJ at para 180.

¹¹ A.H. Oosterhaoof and W. B. Rayner, *Anger and Honsberger Law of Real Property* (2nd ed.; Aurora: Canada Law Book Inc., 1985, pp. 98-99 as quoted in Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (3rd ed.; Saskatoon: Purich Publishing Ltd., 2004), p. 14.

Given that native title has been characterized as encompassing a right to “exclusive use and occupation”¹², “[s]ome Aboriginal people have argued that Aboriginal title is an encumbrance on fee simple title that could result in possession by the Aboriginal group concerned.”¹³ According to Thomas Isaac, however, “the nature of Aboriginal title is inconsistent with the essential attributes of fee simple title, thereby likely excluding the possible remedy of possession in the face of an Aboriginal title claim.”¹⁴ What effect(s), if any, the grant of a fee simple title made prior to 1982 has on native title, however, has yet to be directly addressed by Canadian courts.

c) Jurisdiction to Extinguish Native Title

Only *federal* legislation could lawfully extinguish native title in the Canadian case prior to 1982. This is because section 91(24) of the *Constitution Act, 1867* confers exclusive legislative authority over ‘Indians, and the Lands reserved for the Indians’ on the Federal Parliament of Canada. This section protects what has been described by the Canadian courts as a ‘core of Indianness’ from provincial intrusion.¹⁵ According to the Supreme Court’s *Delgamuukw* decision, “Section 91(24) of the *Constitution Act, 1867* ... carries with it the jurisdiction to legislate in relation to aboriginal title, and by implication, the jurisdiction to extinguish it.”¹⁶ A provincial parliament, therefore, could not have extinguished native title, either through specific legislation or through provincial

¹² *Delgamuukw*, *supra* note 1, Lamer CJ at para 117.

¹³ Isaac (2004), p. 14.

¹⁴ *Ibid.*

¹⁵ See, for example: *R v. George* [1966] 2 SCR 267; *Kruger and Manuel v. R* [1978] 1 SCR 104; *R v Sutherland* [1980] 2 SCR 451; *Four B Manufacturing v UGW* [1980] 1 SCR 1031; *R v Horseman* [1990] 1 SCR 901.

¹⁶ *Delgamuukw*, *supra* note 1, *per* Lamer CJ and Cory, McLachlin and Major JJ.

laws of general application made prior to 1982 because such legislation would have been *ultra vires* the province. As Chief Justice Lamer explained in *Delgamuukw*:

My concern is that only laws with the sufficiently clear and plain intention to extinguish aboriginal rights would be laws in relation to Indians and Indian lands. As a result, a provincial law could never, *proprio vigore*, extinguish aboriginal rights, because the intention to do so would take the law outside provincial jurisdiction.¹⁷

In sum, the jurisdiction to legislatively extinguish native title in the ‘sovereignty to 1982’ period, whether through legislation evincing a ‘clear and plain intention’ to extinguish native title or through legislation ‘necessarily inconsistent with native title’, was exclusively federal. Whether provincial governments could have lawfully infringed native title during the ‘sovereignty to 1982’ period, however, has yet to be specifically addressed by the Canadian courts.

d) Compensation

Whether the legislative extinguishment and/or infringement of native title prior to 1982 requires compensation has not yet been directly addressed by the Canadian courts. Because native title has been defined as a *sui generis* proprietary interest in land and the common law of real property generally requires compensation when a proprietary interest is expropriated, and because the relationship between the Crown and Indigenous Peoples has been defined as a ‘fiduciary relationship’¹⁸, however, it is possible that the legislative

¹⁷ Ibid, Lamer CJ at para 180. See also: *per* Lamer CJ and Cory, McLachlin and Major JJ and *per* La Forest and L’Heureux Dubé JJ in the same.

¹⁸ See: *R. v. Guerin* [1985] 1 CNLR 120 (SCC); *Sparrow*, *supra* note 7; L.I. Rotman, “Provincial Fiduciary Obligations to First Nations: The Nexus Between Governmental Power and Responsibility” (1994) 32:4 *Osgoode Hall Law Journal* 735. For a general discussion of fiduciary obligations, see, for example, *Frame v. Smith* [1987] 2 SCR 99; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 SCR 574; and *Canson Enterprises Ltd. v. Boughton and Co.*, [1991] 3 SCR 543.

extinguishment (and possibly infringement) of native title prior to 1982 may be reasoned to require some form of compensation to be lawfully effected.

ii) 1982 to the Present

a) Voluntary Surrender

From 1982 onward Indigenous Peoples maintained the right to ‘voluntarily surrender’ their native title by consent. The addition of section 35(1) to the Canadian Constitution in 1982, however, transformed native title from a common law right into a constitutional right, thus changing the vulnerability of native title at common law. Section 35(1) reads: ‘The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed’. Not only does this section make Canada “the only country in the world in which constitutionally entrenched aboriginal and treaty rights serve as the basis for framing aboriginal-state relations”¹⁹, it also makes native title the only real property interest entrenched in the Canadian constitution.

As was explained in chapter 2, prior to 1997 legal uncertainty surrounded the inclusion of native title in the phrase ‘existing aboriginal and treaty rights’. This uncertainty, however, was unequivocally dispelled by the Supreme Court in its *Delgamuukw* decision:

Aboriginal title at common law is protected in its full form by s. 35(1) ... On a plain reading of the provision, s. 35(1) did not create aboriginal rights; rather it accorded constitutional status to those rights which were ‘existing’ in 1982. The provision, at the very least, constitutionalizes those rights which aboriginal peoples possessed at common law, since those rights existed at the time s. 35(1) came into force. Since aboriginal title was a common law right whose existence was recognized well before

¹⁹ Augie Fleras and Jean Leonard Elliott, *The Nations Within: Aboriginal-State Relations in Canada, the United States and New Zealand*, (Toronto: Oxford University Press, 1992), p. 8.

1982 (e.g., *Calder, supra*), s. 35(1) has constitutionalized it in its full form.²⁰

Since 1982, then, native title has been considered a constitutional right in the Canadian case affording it increased protection from lawful legislative extinguishment and/or infringement.

b) Ordinary (Federal and Provincial) Legislation

With the adoption of s. 35(1), the extinguishment of native title without the consent of Indigenous Peoples became impracticable. This does not, however, mean that native title is an absolute right. According to legal reasoning proffered in *Delgamuukw*, constitutionally protected native title may be *infringed* (or trespassed upon) by both the federal and provincial governments, but only if the infringement satisfies a two-pronged justification test laid out in the same decision. In sum, an infringement of native title is only lawful, according to the Supreme Court in *Delgamuukw*, if it: “(1) furthers a compelling and substantial legislative objective and (2) is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples.”²¹

According to the Supreme Court, the range of legislative objectives that can justify a legislative infringement of native title is fairly broad. In the opinion of Chief Justice Lamer, writing for Justices Cory and Major, in *Delgamuukw*:

the development of agriculture, forestry, mining and hydroelectric power, the general economic development of the interior of British Columbia, protection of the environment or endangered species, the building of

²⁰ *Delgamuukw, supra* note 1, Lamer CJ at para 133. Also see: *per* Lamer CJ and Cory, McLachlin and Major JJ in the same.

²¹ *Ibid, per* Lamer CJ and Cory, McLachlin and Major JJ. Also see: *per* La Forest and L’Heureux Dubé JJ in the same.

infrastructure and the settlement of foreign populations to support those aims, are the kind of objectives that are consistent with this purpose and, in principle, can justify the infringement of aboriginal title.²²

The justification of native title infringement according to one of the objectives listed above, however, “is ultimately a question of fact that will have to be examined on a case-by-case basis.”²³ Furthermore, any such legislative objectives are subject to ‘the accommodation of Indigenous Peoples’ interests’ according to the special fiduciary relationship that exists between the Crown and Indigenous Peoples.²⁴ In sum, to be lawful any legislative infringement of native title since 1982 must not only be legally ‘justified’ but also legally consistent with the fiduciary duty owed to Indigenous Peoples by the Crown . As explained by Justice Dickson in *R. v Guerin* [1984]:

[T]he nature of Indian title and the framework of the statutory scheme established for disposing of Indian land places upon the Crown an equitable obligation, enforceable by the courts, to deal with the land for the benefit of the Indians. This obligation does not amount to a trust in the private law sense. It is rather a fiduciary duty. If however, the Crown breaches this fiduciary duty it will be liable to the Indians in the same way and to the same extent as if such a trust were in effect.²⁵

According to the Supreme Court, the fiduciary duty owed to Indigenous Peoples by the Crown may require that native title be given priority over all other interests in the land in any infringing law or act. In such an instance the Supreme Court has reasoned that the appropriate authority must demonstrate “both that the process by which it allocated the resource and the actual allocation of the resource which results from that

²² Ibid, Lamer CJ at para 165. Also see *per La Forest and L’Heureux Dubé JJ* in the same. “It is noteworthy that most of these objectives fall within provincial jurisdiction.” [Isaac (2004), p. 20].

²³ *Delgamuukw*, *supra* note 1, Lamer CJ at para 165.

²⁴ Ibid, *per La Forest and L’Heureux Dubé JJ* at para 203.

²⁵ *Guerin*, *supra* note 18, Dickson J at 377. See also: *Wewaykum Indian Band v. Canada* [2002] 4 SCR 245; *Ontario (Min. of Municipal Affairs and Housing) v Trans-Canada Pipelines Ltd.* [2000] 3 CNLC 153 (Ont. CA).

process reflect the prior interest of the holders of aboriginal title in the land.”²⁶ This may require the legislation in question to, for example: include provisos requested by native title holders; reserve resource royalties to native title holders; and/or, provide for the restoration of the native title lands following the infringing action.

The fiduciary duty of the Crown, however, may also be articulated in a manner different than the idea of priority. As Chief Justice Lamer explained in *Delgamuukw*:

... the fiduciary relationship between the Crown and aboriginal peoples may be satisfied by the involvement of aboriginal peoples in decisions taken with respect to their land ... There is always a duty of consultation ... The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation, particularly when provinces enact hunting and fishing regulations in relation to aboriginal lands.²⁷

Justices La Forest and L’Heureux-Dubé agreed:

Under the second part of the justification test, these legislative objectives are subject to the accommodation of the aboriginal peoples’ interest. This accommodation must always be in accordance with the honour and good faith of the Crown. Moreover, when dealing with a generalized claim over vast tracts of land, accommodation is not a simple matter of asking whether licences have been fairly allocated in one industry, or whether conservation measures have been properly implemented for a specific resource. Rather, the question of accommodation of ‘aboriginal title’ is much broader than this. Certainly, one aspect of accommodation in this context entails notifying and consulting aboriginal peoples with respect to the development of the affected territory.²⁸

²⁶ *Delgamuukw*, *supra* note 1, Lamer CJ at para 167.

²⁷ *Ibid*, Lamer CJ at para 168.

²⁸ *Ibid*, La Forest and L’Heureux Dubé JJ at para 203.

The fiduciary duty of the Crown to Indigenous Peoples, then, *may* require that Indigenous interests be given priority in any infringing legislation but, at the same time, it will *always* impose a duty of consultation on the Crown before an infringing action or measure is lawfully brought to bear on native title.

Although Canadian courts have yet to address the issue directly, this duty to consult likely extends to all Crown grants made in the post-1982 period (including grants of title in fee simple).

c) Compensation

Because native title has been characterised as embodying an ‘inescapable economic component’, the Supreme Court has reasoned that “fair compensation will ordinarily be required when aboriginal title is infringed.”²⁹ What constitutes ‘fair compensation’ for the legislative infringement of native title, however, is not fixed and must be determined on a case-by-case basis. According to the reasoning of Chief Justice Lamer in *Delgamuukw*, “[t]he amount of compensation payable will vary with the nature of the particular aboriginal title affected and with the nature and severity of the infringement and the extent to which aboriginal interests were accommodated.”³⁰ As *La Forest* and *L’Heureux-Dubé* reasoned in the same decision:

[it] must be emphasized, nonetheless, that fair compensation in the present context is not equated with the price for a fee simple. Rather, compensation must be viewed in terms of the right and in keeping with the honour of the Crown. Thus, generally speaking, compensation may be greater where the expropriation relates to a village area as opposed to a

²⁹ *Ibid*, *per* Lamer CJ and Cory, McLachlin and Major JJ. See also, *per* La Forest and L’Heureux Dubé; Lamer at para 169; and La Forest and L’Heureux Dubé at para 203 in the same.

³⁰ *Ibid*, at para 169.

remotely visited area. I add that account must be taken of the interdependence of traditional uses to which the land was put.³¹

It follows that compensation for the legislative infringement of native title in the post-1982 period in Canada, whether determined through negotiation or by the courts, is likely to involve a complex interplay of common law principles and Indigenous practices, as well as economic and cultural land valuation.

Although Canadian courts have yet to address this issue directly, the obligation to provide compensation likely applies to all Crown grants made in the post-1982 period (including the grant of title in fee simple).

iii) Summary of the Canadian Case

To summarize the vulnerability of native title in the Canada case: prior to 1982 native title could be lawfully extinguished either through its ‘voluntary surrender’ by Indigenous Peoples or through federal legislation evincing a ‘clear and plain’ intention to extinguish native title. During this period, compensation was not legally required to effect voluntary extinguishment (although it was afforded in practice) and may or may not have been required to effect legislative extinguishment. From 1982 to the present, native title could and can only be extinguished through voluntary surrender (i.e. with Indigenous consent). Federal or provincial legislation can lawfully infringe (but not extinguish) constitutionally protected native title rights, but only if the infringement furthers a ‘compelling and substantial legislative objective’ *and* is consistent with the Crown’s fiduciary relationship with Indigenous Peoples. In sum, the post-common law

³¹ Ibid, La Forest and L’Heureux Dubé JJ at para 203.

vulnerability of native title is largely consistent with the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) lawful land owners in the Canadian case. This is owing to the fact that the vulnerability of native title at common law is largely consistent with the vulnerability of 'ordinary' proprietary tenures at common law.

As will now be demonstrated, native title is much more vulnerable to extinguishment in the Australian case (even when compared to the 'pre-1982' period in the Canada case), a situation which is largely consistent with the initial and historically contingent recognition of Indigenous Peoples as land inhabitants/land users.

II – THE VULNERABILITY OF NATIVE TITLE IN AUSTRALIA

The High Court of Australia has defined native title as a *sui generis* personal interest in land, with possible proprietary aspects. This characterisation denies native title as a right to the land itself. Unlike a proprietary interest, a personal interest or right in land does not constitute a legal or beneficial estate or interest in the actual land and, as such, is absent any equitable estate or interest in the land itself. This makes a personal interest much more vulnerable to extinguishment than a proprietary interest. A personal interest in land (such as a usufructuary right) is a non-proprietary interest, which amounts to a right of permissive use and/or occupancy or a licence to use and/or occupy the land at the will of the Crown (i.e. according to the discretion of the Crown). A personal interest can be extinguished or terminated at the will of the Crown, and does not generally require the payment of compensation. Although the High Court of Australia has reasoned that native title may have some proprietary interests, its vulnerability has

been reasoned in general accordance with the vulnerability of ‘ordinary’ personal interests at common law. Devoid of any constitutional protection, this makes native title extremely vulnerable to extinguishment in the Australian case, as will now be explained.

i) Voluntary Surrender

As in Canada, native title can be extinguished in Australia through its ‘voluntary surrender’ by Indigenous Peoples.³² Because Australia was considered a legal *terra nullius* until the High Court’s 1992 *Mabo (No. 2)* decision, however, this form of extinguishment gained relevance only recently. No historic treaties were signed in Australia (excepting the ill-fated Batman treaty of 1835) and it was only with the passage of national native title legislation (i.e. the *Native Title Act, 1993(Cth)*) that Indigenous Peoples in Australia gained a practical means of negotiating the voluntary surrender of their traditional territories. Prior to the *Mabo (No. 2)* decision, then, Australian authorities considered it unnecessary to extinguish native title through treaty agreements (or other means) because native title was assumed not to exist.³³ Indigenous Peoples’ legal interests in land were therefore completely ignored from the time of first contact until the 1992 *Mabo (No. 2)* decision, and the entire continent of Australia was settled as if the Crown’s title were a lawful *royal demesne*.

³² See: *Mabo v Queensland (No 2)* [1992] 66 ALR 408, Brennan J at p. 430.

³³ In the absence of any explicit Imperial instructions on Indigenous land acquisition, the Australian colonies were settled with an absolute disregard for Indigenous interests in or ‘ownership’ of traditional territories. By the mid-20th century, it was a generally held view that native title was not part of the Australian common law. In *Milirrpum v Nabalco Pty. Ltd.* [1971]17 FLR 141, the first native title case to

ii) Ordinary Legislation

As a common law right devoid of constitutional protection, native title is weaker than the prerogative rights of the Crown (now embodied in the executive and legislative authorities of the Australian state) in the Australian case. Native title, therefore, can be lawfully extinguished by ‘ordinary’ legislation passed by the appropriate body. As Justices Deane and Gaudron explained in *Mabo (No. 2)*:

Like other legal rights, including right of property, the rights conferred by common law native title and the title itself can be dealt with, expropriated or extinguished by valid Commonwealth, State or Territory legislation operating within the State or Territory in which the land in question is situated. To put the matter differently, the rights are not entrenched in the sense that they are, by reason of their nature, beyond the reach of legislative power.³⁴

Lawful legislative extinguishment can be effected in the Australian case by laws and acts of the Commonwealth, State *and* Territorial authorities. This is because the constitutional jurisdiction to ‘acquire property’ resides in the Commonwealth Parliament while the constitutional jurisdiction to ‘manage lands’ resides in State and Territory Parliaments. It also results from the fact that ‘Indigenous affairs’ has been an area of shared constitutional jurisdiction in Australia since 1967.³⁵ In Canada, by contrast, only *federal* laws or acts (sanctioned prior to 1982) can extinguish native title, owing to the

be litigated in Australia, justice Blackburn of the Northern Territory Supreme Court confirmed this view and categorically denied the existence of native title at common law. (See chapters 1 and 2).

³⁴ *Mabo (No 2)*, *supra* note 32, Deane and Gaudron JJ at p. 452. See also: Brennan J at pp. 429 in the same; and 434; and, *Wik and Thayorre Peoples v State of Queensland* [1996] 141 ALR 129, Brennan J. at p. 151.

³⁵ Prior to 1967 ‘Indigenous affairs’ lay within the jurisdictional competence of the Australian States. This is because s. 51(xxvi) of the Australian Constitution precluded the Commonwealth from making laws for people of ‘the aboriginal race in any State’. The *Constitutional Alteration (Aboriginals) Act 1967*, however, removed this offending prohibition.

Federal Parliament's exclusive constitutional jurisdiction over 'Indians and the Lands reserved for the Indians'.

In Australia, the legislative extinguishment of native title can be effected by three kinds of legislation: "(i) laws or acts which simply extinguish native title; (ii) laws or acts which create rights in third parties in respect of a parcel of land subject to native title which are inconsistent with the continued right to enjoy native title; and (iii) laws or acts by which the Crown acquires full beneficial ownership of land previously subject to native title."³⁶

In the first category of extinguishing legislation are laws or acts that create no rights inconsistent with native title but reveal a 'clear and plain' intention to extinguish native title. As the High Court reasoned in *Mabo (No. 2)*: "While sovereignty carries the power to create and extinguish private rights and interests in land, the exercise of a power to extinguish native title must reveal a plain intention to do so whether the action be taken by the legislature or the executive."³⁷ The test of intention is an objective test to be met through an examination of the "words of the relevant law or from the nature of the action and of the power supporting it"³⁸ and not through an "inquiry into the state of mind of the relevant law or legislators."³⁹ This category of lawful legislative extinguishment is akin to the kind of legislative extinguishment permitted in the 'sovereignty to 1982' period of the Canadian case (described above).

³⁶ *Wik*, *supra* note 34, Brennan J at p. 151.

³⁷ *Mabo (No 2)*, *supra* note 32, per Brennan J (Mason and McHugh JJ agreeing) at p. 409. See also: Brennan J at p. 432, Deane and Gaudron JJ at p. 452, and, Toohey J at p. 489 in the same; and, *Wik*, *supra* note 34, Brennan J at p. 151; and, Kirby J at p. 282-284.

³⁸ *Wik*, *supra* note 34, Brennan J at p. 151. See also: *Mabo (No 2)*, *supra* note 32, Brennan J at 432; Deane and Gaudron JJ at p. 452; and Toohey J at p. 489.

³⁹ *Ibid*, Brennan J at p. 151.

Standing apart from the ambiguous effect of ‘necessarily inconsistent ordinary legislation’ in the Canadian case, the second and third categories of lawful extinguishing legislation identified by the High Court of Australia unequivocally affirm that native title is effectively extinguished by ordinary laws or acts that create rights ‘inconsistent’ with the continuing enjoyment or exercise of native title. As was explained above, such laws and acts likely only suspend native title in the Canadian case. As will now be explained, the effects of ‘inconsistent grants’ on native title in the Australian case make native title much more vulnerable to extinguishment in the Australian case than in the Canadian case.

In the second category of lawful extinguishing legislation in the Australian case are laws or acts that create third party rights inconsistent with the ‘continued right to enjoy native title’. As Brennan explained in *Mabo*:

A Crown grant which vests in the grantee an interest in land which is inconsistent with the continued right to enjoy a native title in respect of the same land necessarily extinguishes the native title. The extinguishing of native title does not depend on the actual intention of [the legislating authority] (who may not have adverted to the rights and interests of the indigenous inhabitants or their descendants), but on the effect which the grant has on the right to enjoy the native title.⁴⁰

In other words, if a personal or proprietary interest granted by the Crown effectively prevents (i.e. is ‘inconsistent’ with) the continued enjoyment of a native title in respect of the same land, native title is effectively extinguished to the extent of the inconsistency.

What does this mean in practice?

⁴⁰ *Mabo (No 2)*, *supra* note 32, Brennan J at pp. 433-434. See also: Brennan J at p. 432; and, Deane and Gaudron JJ at p. 443 in the same; and, *Wik*, *supra* note 34, Kirby J at p. 152; Brennan J at p. 153; Toohey J at p. 190; and, Gummow J at p. 226.

In the Australian case, then, a grant of a title in fee simple will always lawfully extinguish native title because “the fee simple, as the largest estate known to the common law, confers the widest powers of enjoyment in respect of all the advantages to be derived from the land itself and from anything upon it.”⁴¹ A native titleholder, therefore, can not assert native title or exercise native title rights on land held pursuant to a fee simple title without depriving the fee simple grantee of his/her unqualified right to ‘exclusive possession’ (a central tenet of ‘proprietary’ interests) at common law. As Justice Brennan explained in *Wik*: “[t]he law can attribute priority to one right over another but it cannot recognise the coexistence in different hands of two rights that cannot both be exercised at the same time.”⁴² In sum, having been characterized as a unique ‘personal’ interest in land, native title is considered inferior to ‘ordinary’ proprietary interests and must therefore always yield to such interests.

If, however, native title rights can be enjoyed concurrently with the grant of some lesser interest in the same land and without depriving the grantee of his/her land holding rights at common law, native title is not extinguished. For example, the question at issue in the *Wik* case was whether the grant of a ‘pastoral lease’ over two large areas of land in Queensland necessarily extinguished native title. In its decision the High Court reasoned that the rights and interests of any given pastoral leaseholder had to be determined by examining the relevant statute and particular lease(s) at hand. This examination revealed that the pastoral leases in question did not give the leaseholders a right to ‘exclusive possession’ of the lands in question. As a result of this decision, the Court confirmed that the granting of a pastoral lease in Australia does not *necessarily* extinguish native title

⁴¹ *Wik*, *supra* note 34, Gummow J at p. 226.

and that native title *can* co-exist with the rights of a leaseholder. At the same time, however, the Court also ruled that where there was a conflict or ‘inconsistency’ in the exercise of the rights of pastoral leaseholders and the rights of a native title holders, the rights of a pastoral leaseholders must always prevail. In sum, native title can only survive when challenged by common law property interests that confer something less than a right of ‘exclusive possession’. As Justice Brennan summarized in *Mabo (No. 2)*:

[w]here the Crown has validly alienated land by granting an interest that is wholly or partially inconsistent with a continuing right to enjoy native title, native title has been extinguished to the extent of inconsistency. Thus native title has been extinguished by grants of estates of freehold or of leases but not necessarily by the grant of lesser interests (eg. authority to prospect for minerals).⁴³

Simply stated, the second category of lawful legislative extinguishment identified by the High Court of Australia characterises native title as inferior to other common law titles (both ‘proprietary’ *and* ‘personal’) and thus requires native title to yield to other ‘ordinary’ common law land rights in the event of a conflict.⁴⁴ In Canada, by contrast,

⁴² Ibid, Brennan J at p. 153.

⁴³ *Mabo (No 2)*, *supra* note 32, Brennan J at p. 434.

⁴⁴ Hal Wootten has questioned the High Courts reasoning on ‘inconsistent extinguishment’: “Why indeed [do leases extinguish native title]? The reason given by the High Court was that a lease vests possession in the lessee and the Crown acquires the reversion expectant on the expiry of the term. This begs the question. If the extinguishing effect of an act depends on a clear manifestation of intention (to be found not as a subjective intention in the mind of the agent, but in the effect of the act), why should one assume that the granting of a lease for say a year was intended to extinguish native title forever, rather than simply burden or encumber it for a year? I can lease my freehold for a hundred years without extinguishing it; why should a limited grant not have a similar effect on native title? Why must the Crown have intended to take the reversion for itself, rather than leave the native title holders to enjoy the native title when the burden of the lease came to an end? To hold otherwise appears to require a clear and plain intention to preserve native title, rather than a clear and plain intention to extinguish it.” [Hal Wootten, “The end of dispossession? Anthropologists and lawyers in the native title process” in *Native Title: Emerging Issues for Research, Policy and Practice*, J. Finlayson and D.E. Smith (eds), CAEPR Research Monograph No. 10, (Canberra: Centre for Aboriginal and Economic Policy Research – Australian National University, 1995), p. 115]. The fact that so much of Australia was once under pastoral lease gives this issue major importance.

native title is superior to personal interests and can compete on an equal footing with proprietary interests.

In the final category of legislation that lawfully extinguishes native title in the Australian case are laws or acts by which the Crown acquires full beneficial ownership of the land. “That may occur by acquisition of native title by or under a statute ... Or the Crown, without statutory authority may have acquired beneficial ownership simply by appropriating land in which no interest has been alienated by the Crown.”⁴⁵ In sum, the Crown can lawfully extinguish native title by acquiring to itself rights in the land which are ‘inconsistent’ with native title. In other words, by elevating its *radical title* to a *plenum dominium*.

To determine whether (or to what extent) native title is extinguished by or under Crown statute, “it is necessary to identify the particular law or act which is said to effect the extinguishment and to apply the appropriate test to ascertain the effect of that law or act and whether that effect is inconsistent with the continued right to enjoy native title.”⁴⁶ If the effect of the law or act in question is to abridge or abrogate the continued enjoyment of native title, then native title is effectively extinguished to the extent of the inconsistency. If, however, the law or act in question does not abridge or abrogate the continued enjoyment of native title, native title survives. So, for example, native title “may not be extinguished by legislation that does no more than provide in general terms for the alienation of the ‘waste lands’ of a colony or Crown land.”⁴⁷ In the case of Crown appropriations, however, the land appropriated must actually be used for some purpose

⁴⁵ *Wik, supra* note 34, Brennan J at p. 152.

⁴⁶ *Ibid*, Brennan J at pp. 152-153.

inconsistent with native title to effect extinguishment. As Justice Brennan reasoned in

Wik:

... the appropriation of land gives rise to the Crown's beneficial ownership only when the land is actually used for some purpose inconsistent with the continued enjoyment of native title – for example, by building a school or laying a pipeline. Until such a use takes place, nothing has occurred that might affect the legal status quo. A mere reservation of the land for the intended purpose, which does not create third party rights over the land, does not alter the legal interests in the land, but the Crown's exercise of its sovereign power to use unalienated land for its own purposes extinguishes, partially or wholly, native title interests in or over the land used.⁴⁸

Of central relevance to issue of native title's vulnerability to extinguishment by 'inconsistent grant' is the question of whether native title is properly characterized as a 'title to land' or a 'bundle of rights'. In the Canadian case, the Supreme Court has clearly accepted the former approach:

Constitutionally recognized aboriginal rights fall along a spectrum with respect to their degree of connection with the land. At one end are those aboriginal rights which are practices, customs and tradition integral to the distinctive aboriginal culture of the group claiming the rights but where the use and occupation of the land taking place is not sufficient to support a claim to the land. In the middle are activities which, out of necessity, take place on the land and indeed, might be intimately related to a particular piece of land. Although an aboriginal group may not be able to demonstrate title to the land, it may nevertheless have a site-specific right to engage in a particular activity. At the other end of the spectrum is aboriginal title itself which confers more than the rights to engage in site-specific activities which are aspects of the practices, customs and traditions of distinctive aboriginal cultures.⁴⁹

⁴⁷ *Mabo (No 2)*, *supra* note 32, *per* Toohey at p. 410. See also: Toohey J at p. 490; and, Deane and Gaudron JJ at p. 452 and 454 in the same.

⁴⁸ *Wik*, *supra* note 34, Brennan J at p. 152. See also: *Mabo (No 2)*, *supra* note 32, Brennan J at p. 433; and, Deane and Gaudron JJ at p. 452

⁴⁹ *Delgamuukw*, *supra* note 1, *per* Lamer CJ, Cory, McLachlin and Major JJ.

This distinction between ‘native title’ and ‘aboriginal rights’ presumably applies in the Canadian case notwithstanding section 35(1) of the *Constitution Act, 1982* and thus, laws or acts which partially impair native title have not and can not effect native title’s lawful extinguishment. Instead, while rights ‘parasitic’ on native title may be ‘suspended’ (or, prior to 1982, possibly ‘extinguished’) by ‘inconsistent grant’ in the Canadian case, the underlying native title remains undisturbed. As was explained in Chapter 3, however, in Australia the distinction between ‘native title’ and ‘indigenous rights’ has yet to be conclusively determined. In *Mabo (No. 2)* the majority of the High Court simply reasoned that:

... where an indigenous people (including a clan or group), as a community are in possession of land under a proprietary native title, their possession may be protected or their entitlement to possession may be enforced by a representative action brought on behalf of the people or by a sub-group or individual who sues to protect or enforce rights or interests which are dependent on the communal native title. Those rights or interests are, so to speak, carved out of the communal native title.⁵⁰

Whether rights carved out of native title are ‘parasitic’ on native title (the ‘title to land’ approach) or ‘constitutive of’ native title (the ‘bundle of rights’ approach), however, was not discussed by the High Court justices in the same.

This question was, however, directly addressed by the High Court of Australia in *Ward v Western Australia (2002)*⁵¹ (commonly referred to as the *Miriuwung Gajerrong* case after its native title litigants), which involved a native title determination under the *Native Title Act, 1993*. In its decision on this case, a majority of the High Court adopted a ‘bundle of rights’ approach to native title and accepted its devastating consequences for

⁵⁰ *Mabo (No 2)*, *supra* note 32, Brennan J at p. 431.

⁵¹ *Western Australia v Ward* [2002] HCA 28.

native title's continuing vitality.⁵² Following this approach to native title, 'inconsistent grants' can effectively extinguish native title, parcel-by-parcel, by progressively eroding the 'bundle or rights' that constitute the native title itself. As Heatherton explains:

[t]he characterisation of native title as a separable 'bundle' of individual and unrelated rights allows for the removal of individual rights from the 'bundle' by Crown acts that are inconsistent with that particular exercise of native title. This 'bundle' may then be progressively reduced by the cumulative effect of a succession of different grants.⁵³ Over time, this process may lead to such extensive extinguishment that 'a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character'.⁵⁴ The result of this approach is that native title is extremely susceptible to every small incursion and may only ever decrease in strength.⁵⁵

In contrast to the 'bundle of rights' approach, which facilitates the parcel-by-parcel extinguishment of native title through the issuing of multiple inconsistent grants over the same land over time, the 'title to land' approach (such as has been adopted in Canada) protects native title from parcel-by-parcel extinguishment by drawing a clear distinction between 'native title' and the rights parasitic upon it. As Heatherton again explains:

The legal effect of an inconsistent act depends on the degree of inconsistency. Inconsistency results in extinguishment of native title only where the inconsistency reflects an '... intention of the Crown to remove all connection of the aboriginal people from the land in question'.⁵⁶ This intention will only be held to exist where the inconsistent act is:

⁵² See: *Western Australia*, *supra* note 51, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.

⁵³ See: *Western Australia and Ors. v. Ward and Ors.* [2000] 170 ALR 159 (FCA), *per* Beaumont and von Doussa JJ at 189.

⁵⁴ *Ibid.*

⁵⁵ Phillipa Hetherington, "2001: A Native Title Odyssey", *Indigenous Law Bulletin* 5:4 (Nov/Dec 2000), p. 16-17.

⁵⁶ *Western Australia*, *supra* note 53, *per* North J at 328.

- *totally* inconsistent with the exercise of all native title rights and interests; and
- *permanently* inconsistent.

Where inconsistency is less than ‘fundamental’ the impairment of the exercise of native title rights will result in suspension or regulation of those rights for the duration of the inconsistency but the underlying title will remain.⁵⁷

It goes without saying that the High Court’s relatively recent decision in the *Miriuwung Gajerrong* case that native title is properly characterized as a ‘bundle of rights’ will have significant implications for the vulnerability of native title in the Australian case. As Hal Wootten explains:

On this view ... Aboriginal people were never ‘owners’ of their lands, but just users of land, and only the right to continue their traditional uses, for example right to traverse the land, hunt on it, to perform ceremonies on it, presumably to defecate and urinate on it, but not to mine it or run cattle on it. On this view, the land belonged to no one – we are back to *terra nullius* with grafted on to it a few superficial usufructuary rights which may become of decreasing importance or be abandoned as Aboriginal people are drawn more into the western economy and western lifestyle.⁵⁸

iii) Compensation

There are two important qualifications on the legislative extinguishment of native title in the Australian case, although their full ramifications have yet to be conclusively decided at law. The first is section 51(xxxi) of the Australian Constitution, which requires any expropriation of property by the Commonwealth to provide ‘just terms’.

⁵⁷ Hetherington (2000), p. 17.

⁵⁸ Wootten (1995), p. 109. According to Wootten, the concept of native title as a ‘bundle of rights’ defined by previous use is based on a misreading of *Mabo* as well as by a misunderstanding of indigenous relationships with land: “The *Mabo* judgement says that Aboriginal rights are defined not by use, but by a system of law and custom – just as the rights of freeholders and leaseholders depend not on the use they make or have made of the land, but on what the relevant system of law says are their rights.” [p. 110].

In *Mabo (No 2)*, Justices Deane and Gaudron reasoned “that any legislative extinguishment of [native title] rights would constitute an expropriation of property, to the benefit of the underlying estate, for the purpose of s 51(xxxi).”⁵⁹ Therefore, “[t]he Crown might extinguish [native title] but in so far as that might be done by inconsistent grant a liability to pay compensatory damages stands and is confirmed by the Constitution (Cth), s 51(xxxi).”⁶⁰ In the same decision, however, they along with Justice Toohey concluded that limitations statutes apply to any native title compensation claims that might be proceed from s. 51(xxxi), and thus any remedy for the past extinguishment native title has likely already been lost.⁶¹ Furthermore, section 51(xxxi) applies only to the Commonwealth and thus removes State and Territorial Parliaments from any compensatory obligations this section might potentially impose.

The second limitation on the legislative extinguishment of native title in the Australian case applies equally to Commonwealth, State and Territorial Parliaments and is found in section 10(1) of the *Racial Discrimination Act, 1975* (Cth). The *Racial Discrimination Act, 1975* (Cth) (henceforth *RDA*) is a Commonwealth act implementing Australia’s obligations as a party to the *International Convention on the Elimination of All Forms of Racial Discrimination*. Section 10(1) of the *RDA* requires that rights enumerated in Article 5 of the International Convention (which include the right to own and inherit property) be enjoyed equally by all persons regardless of race, colour or national or ethnic origin. According to the High Court, this section “clothes the holders of traditional native title ... with the same immunity from legislative interference with

⁵⁹ *Mabo (No 2)*, *supra* note 32, Deane and Gaudron JJ at p. 452.

⁶⁰ *Ibid*, Deane and Gaudron JJ at p. 409.

⁶¹ *Ibid*, Deane and Gaudron JJ at p. 453; and Toohey J at p. 490.

their enjoyment of their human right to own and inherit property as it clothes other persons in the community.”⁶² The legislative extinguishment of native title, therefore, must be consistent with the legislative extinguishment of ‘ordinary’ titles to conform with the terms of the *RDA*.

Because native title is a *sui generis* personal interest, however, to what standard its lawful legislative extinguishment should be held is a matter of considerable uncertainty. For example, whether s. 10(1) gives rise to a right to compensation upon the legislative extinguishment of native title is a matter of some legal debate. As Justices Mason and McHugh explain:

The main difference between those members of the Court who constitute the majority [in *Mabo (No. 2)*] is that, subject to the operation of the *Racial Discrimination Act 1975* (Cth), neither us nor Brennan J agrees with the conclusion to be drawn from the judgements of Deane, Toohey and Gaudron JJ that, at least in the absence of clear and unambiguous statutory provision to the contrary, extinguishment of native title by the Crown by inconsistent grant is wrongful and gives rise to a claim for compensatory damages. We note that the judgement of Dawson J supports the conclusion of Brennan J and ourselves on that aspect of the case since his Honour considers that native title, where it exists, is a form of permissive occupancy at the will of the Crown.⁶³

In the subsequent *Wik* decision, Deane and Gaudron again opined that fair compensation would be required to effect native title’s legislative extinguishment in the absence of ‘clear and unambiguous words’⁶⁴, but compensation was not at issue in the case and thus was not addressed by the other High Court justices deciding the case.

All that is certain from the judicial reasoning on the matter to date, then, is that “a State or Territory law made or executive act done since [the *Racial Discrimination Act*]

⁶² *Mabo v Queensland (No 1)* (1998) 166 CLR at 219 as quoted by Brennan in *Mabo (No 2)*, *supra* note 32, at p. 427.

⁶³ *Mabo (No 2)*, *supra* note 32, Mason and McHugh JJ at p. 410.

came into force [on 31 October 1975] cannot effect an extinguishment of native title if the law or executive act would not effect the extinguishment of a title acquired otherwise than as native title.”⁶⁵ Because the extinguishment of ‘ordinary’ personal interests do not generally require compensation to be lawful, however, the extinguishment of native title (a *sui generis* personal interest) may not require compensation either.

iv) National Native Title Legislation

Since 1993, the *Native Title Act, 1993* (Cth) (amended by the *Native Title Amendment Act, 1998* (Cth)) has also played a role in defining or qualifying the legislative extinguishment or infringement of native title in the Australian case. This legislation provides a framework for land dealings affected by native title and, as Commonwealth legislation, applies equally to all levels of government. Since the Act came into force, any extinguishment or infringement of native title must be consistent with the Act to be lawful. Although a comprehensive discussion of this complex legislation is beyond the scope of this chapter (the legislation itself runs over 400 pages and will be discussed at greater length in chapters 6 and 7), several important points deserve mention at this time.

First, the *Native Title Act, 1993* gives validity to all laws or acts that ‘wrongfully’ (meaning without notice, consent or compensation) extinguished native title between the coming into force of the *RDA* (31 October 1975) and the coming in to force of the *Mabo* (*No. 2*) decision (1 July 1993); these acts are termed ‘past acts’. This essentially legislatively validates the dispossession of Indigenous People’s traditional territories

⁶⁴ *Wik*, *supra* note 34, Deane and Gaudron JJ at p. 452.

from the time of first contact to 1993 (laws or acts made prior to 1975 without the regard for native title were most likely lawful).

Second, the *Native Title Amendment Act, 1998* gives validity to all laws or acts that unlawfully or ‘wrongfully’ extinguished native title between the coming into force of the *Native Title Act, 1993* (1 January 1994) and the coming into force of the *Wik* decision (23 December 1996); these acts are termed ‘interim period acts’. This legislatively extends the validity of ‘wrongful’ dispossession up to 1996.

Finally, the *Native Title Act, 1993* and the *Native Title Amendment Act, 1998* set out a process for the future extinguishment or infringement of native title through what are termed ‘future acts’. According to the ‘future act regime’ detailed in the legislation, any future land dealings that may potentially ‘affect’ (i.e. extinguish or infringe) native title must be preceded by a notice informing confirmed and/or potential native title holders of the intended future act and also by ‘consultation’ with registered native title holders and/or registered native title claimants regarding the proposed future act.

It is important to note that prior to its amendment in 1998, the *Native Title Act, 1993* required infringing or extinguishing authority/ies to ‘negotiate’ with registered native title holders and/or registered native title claimants before a ‘future act’ could lawfully proceed on native title land. This gave native title holders and claimants a *de facto* veto over ‘future acts’ and a relatively strong negotiating position. Since the *Native Title Act, 1993* was amended, however, native title holders and claimants need only be ‘consulted’ before a future act may lawfully infringe or extinguish native title. This deprives them of a *de facto* veto over future dealings related to their traditional territories

⁶⁵ Ibid, Brennan J at p. 151.

and substantially diminishes their negotiating position in any negotiations that might occur.⁶⁶

v) Revival

The legislative extinguishment of native title has imposed a tremendous cost on the Indigenous Peoples of Australia. This fact was pointedly recognised and articulated by Justice Brennan in his judgement and reasoning in *Mabo (No 2)*:

As the Governments of the Australian Colonies, and, laterly, the Governments of the Commonwealth, States and Territories have alienated or appropriated to their own purposes most of the land in this country during the last 200 years, the Australian Aboriginal peoples have been substantially dispossessed of their traditional lands. They were dispossessed by the Crown's exercise of its sovereign power to grant land to whom it chose and to appropriate to itself the beneficial ownership of parcels of land for the Crown's purpose ... Aborigines were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation.⁶⁷

Of further devastating consequence in the Australian case, is the fact that once native title is effectively extinguished, it cannot be revived. As Justice Brennan reasoned in *Wik*: “[i]f a lease be granted, the lessee acquires possession and the Crown acquires the reversion expectant on the expiry of the term. The Crown's title is thus expanded from a mere radical title and, on the expiry of the term, becomes a plenum dominium.”⁶⁸ With the exception of Justice Toohey's dissenting opinion on the matter in *Wik*⁶⁹, there is no legal reasoning in the Australian case akin to that present in the Canadian case supporting

⁶⁶ The *Native Title Amendment Act, 1998* also introduced a new (and significantly more stringent) ‘registration test’ for native title claimants and extricated some ‘future acts’ (notably, those involving mining activities) from the application of ‘right to negotiate’ provisions of the Act.

⁶⁷ *Mabo (No 2)*, *supra* note 32, Brennan J at p. 434.

⁶⁸ *Ibid.* Reiterated by Brennan in *Wik*, *supra* note 34, at pp. 154-155.

a 'suspension' of native title or native title rights pending the termination of an inconsistent grant. In sum, native title is and can be effectively and permanently extinguished in the Australian case through: legislation evincing a 'clear and plain' intent to extinguish native title; legislation creating third party rights inconsistent with the continued enjoyment of native title; and, Crown appropriations used for some purpose inconsistent with native title.

vi) 'Consequential' Extinguishment

Furthering the extensive dispossession of Australia's Indigenous Peoples perpetrated and made possible by legislative extinguishment is the ability for native title to be extinguished through Indigenous Peoples' 'abandonment of traditional law and customs', 'abandonment of traditional lands' and 'extinction'. I have termed these forms of native title extinguishment 'consequential' extinguishment. 'Consequential' extinguishment, (not contemplated by the Canadian courts), is a direct result of native title's source being identified in the Australian case as 'the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory'. It thus follows, according to the reasoning of the High Court of Australia, that:

... when the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs, the foundation of native title has disappeared. A native title which has ceased with the abandoning of laws and customs based on tradition cannot be revived for contemporary recognition. Australian law can protect the interests of members of an indigenous clan or group, whether communally or individually, only in conformity with the traditional laws and customs of the people to whom the clan or group belongs and only where members of the clan or group acknowledge those laws and observe those customs (so far as is practicable to do so). Once native title expires, the Crown's

⁶⁹ See: *Wik*, *supra* note 34, Toohey J at pp. 186-187.

radical title expands to a full beneficial title, for then there is no other owner.⁷⁰

Native title can also be irreparably extinguished if a clan or group loses its connection to the land - either physically⁷¹, or by ceasing to acknowledge those laws and observe those customs that connect the clan or group to the land⁷² - or upon the death of the last member of the group or clan⁷³.

The facts of Australian colonization make these related forms of native title extinguishment particularly extensive in their scope. It is a readily acknowledged fact, (considering Australia was considered a legal *terra nullius* until 1992), that the colonization of Australia proceeded with an absolute disregard for Indigenous Peoples and their interests. The result was a massive displacement of Indigenous Peoples from their traditional territories and a gross disruption of Indigenous Peoples' abilities to exercise their traditional laws and customs (including their ability to fulfil land related obligations and to transmit cultural knowledge to younger generations). Despite the fact that the Indigenous survivors of colonization are today attempting to return to their traditional territories and reassert their traditional laws and customs, the finality of native title extinguishment means that very few, if any, Indigenous groups will be able to translate their homeland and cultural revival efforts into viable native title claims. Given that native title can also be extinguished through a wide range of 'ordinary' legislative acts in the Australian case, it is a gross understatement to assert that the dispossession of

⁷⁰ *Mabo (No 2)*, *supra* note 32, Brennan J at p. 430. See also: Toohey J at p. 488 in the same.

⁷¹ See: *Mabo (No 2)*, *supra* note 32, Deane and Gaudron JJ at p. 452 and Toohey J at p. 496.

⁷² See: *Mabo (No 2)*, *supra* note 32, Brennan J at p. 435. Deane and Gaudron JJ (at p. 452 of the same) reason that "where the relevant tribe or group continues to occupy or use the land" they will not lose their native title "by the abandonment of traditional customs and ways".

⁷³ See: *Mabo (No 2)*, *supra* note 32, Brennan J at p. 435; and, Deane and Gaudron JJ at p. 452.

Indigenous Peoples' through lawful native title extinguishment is more easily accomplished in the Australian case than in the Canadian case.

CONCLUSION

According to judicial reasoning in the Canadian case, prior to 1982 native title could be lawfully extinguished by its 'voluntary surrender' by native title holders to the Crown, or through federal legislation evincing a 'clear and plain legislative intent' to extinguish native title. Although 'necessarily inconsistent legislation' enacted in this period may have *practically* extinguished native title (by projecting the 'suspension' of native title into perpetuity) it could not have *lawfully* extinguished native title (because native title 'suspended' by 'necessarily inconsistent legislation' remains viable). This judicial reasoning on native title's vulnerability at common law results from native title's judicial characterization as a *sui generis* proprietary interest arising from Indigenous Peoples' prior occupation of their traditional territories; a characterization that is consistent with Canada's initial and historically contingent recognition of Indigenous rights to land.

According to additional judicial reasoning in the Canadian case, from 1982 onward native title could and can only be lawfully extinguished through its voluntary surrender by Indigenous Peoples to the Crown. This results from judicial reasoning confirming native title's protection by s 35(1) of the *Constitution Act, 1982*, a protective measure that is akin to King George III *Royal Proclamation of 1763* which sought to protect Indigenous Peoples' traditional territories from unlawful dispossession. This interpretation of the link between the contemporary accommodation of native title and the

initial and historically contingent recognition and accommodation of indigenous rights to land is reinforced by the Supreme Court of Canada's determinations that: (i) from 1982 to the present, native title could and can only be lawfully *infringed* by legislation enacted by either Federal or Provincial authorities if such legislation satisfies a two-pronged justification test (requiring the furtherance of 'a compelling and substantial legislative objective' *and* consistency with the Crown's fiduciary relationship with Indigenous Peoples); and, (ii) native title's extinguishment and/or infringement likely requires compensation to be lawful. The Supreme Court of Canada's reasoning on these issues arises from native title's 'inescapable economic component' and/or from the fiduciary relationship judicially reasoned to govern Crown-Indigenous interactions, both of which are consistent with colonial newcomer and Crown treatments of Indigenous Peoples as potential (if not actual) land 'owners' during the early years of colonial settlement.

According to judicial reasoning in the Australian case, by contrast, native title may be extinguished through: its 'voluntary surrender' by Indigenous Peoples to the Crown; Commonwealth, State and Territory legislation evincing a 'clear and plain' intention to extinguish native title; inconsistent grants created by Commonwealth, State and Territorial authorities (i.e. laws or acts that either create rights in third parties or accord full beneficial ownership to the Crown); the abandonment of Indigenous laws and customs by native title holders; the abandonment of 'traditional' lands by native title holders; or, the extinction of a native title holding group or clan. These multiple forms of permanent extinguishment are a result of the judicial characterization of native title as a *sui generis* personal interest arising from the Indigenous laws and customs, which closely

mirrors colonial newcomers' treatment of Indigenous Peoples as land inhabitants and/or land users during the early years of colonial settlement.

Section 51(xxxi) of the *Commonwealth of Australia Constitution Act* likely requires compensation for native title extinguishment through Commonwealth laws or acts in the Australian case, but statutes of limitations project such compensation into the future rather than into the past. Furthermore, although international obligations may require compensation for the extinguishment of native title to be effective in the Australian case, domestic legislation (i.e. the *Native Title Act*) appears to have disregarded any such obligations (see chapter 2).

In sum, native title's judicial characterization as a *sui generis* proprietary interest arising from Indigenous Peoples' prior occupation of the land has rendered it relatively less vulnerable to extinguishment in the Canadian case than has native title's judicial characterization as a *sui generis* personal interest arising from Indigenous laws and customs in the Australian case. The practical implication of this finding is that Indigenous Peoples' in Australia are likely to experience more difficulty asserting and defending continuing native title claims than are Indigenous Peoples' in Canada. This is because the extreme vulnerability of native title at common law in the Australian case has likely already effected the permanent extinguishment of native title over most of the Australian land mass. Although past extinguishment and infringement certainly limit the possible extent of native title claims in the Canadian case, they do so to a much lesser degree than is evinced in the Australian case. Furthermore, while lawful native title extinguishment without compensation is clearly projected into the past through the

reasoning of the Supreme Court of Canada it is equally projected forward and backward in time in the reasoning of the High Court of Australia.

In the final analysis, while the judicial characterization of native title's vulnerability at common law has likely had little impact (positive or negative) on Indigenous Peoples' practical ability to lay claim to their traditional territories in the wake of native title's recognition at common law in the Canadian case, it has likely significantly impeded Indigenous Peoples' abilities to do the same in the Australian case. This conclusion is reinforced by the tests of continuing native title that have been designed by the Supreme Court of Canada and High Court of Australia, as the follow chapter will now demonstrate.

CHAPTER 5

THE PROOF OF NATIVE TITLE AT COMMON LAW

Indigenous Peoples' ability to successfully assert title to their traditional territories in the wake of native title's recognition at common law is arguably the most important indicator of this event's practical significance. Accordingly, much of the popular and academic commentary on native title's recognition at common law in the Canadian and Australian cases has lauded Indigenous Peoples' newly established ability to defend their traditional territorial claims at common law as evidence of this event's important, if not monumental, accommodation of indigenous rights to land. In sum, the existence of formal judicial native title claims processes where none existed before, it is argued or implied, rightly marks native title's recognition at common law as a 'key breakpoint in history' from which a 'reactive' path dependent sequence (characterized by the political recognition and accommodation of native title) followed. According to many Indigenous people and Indigenous studies scholars, however, it is precisely in the proof of native title at common law that native title's recognition at common law reveals itself as little more than one additional event in a 'self-reinforcing' path dependent sequence initiated by the initial and historically contingent recognition of indigenous rights to land during the early years of colonial settlement. As this chapter will now

make clear, however, variations in the judicial characterizations of native title's nature, source, content and vulnerability (detailed in chapters 3 and 4) and their manifestation in the respective judicial claims processes of Canada and Australia (detailed below) provide strong additional support for the 'self-reinforcing' path dependent sequence hypothesis.

I – Proof of Native Title at Common Law: The Canadian Case

Since the Supreme Court of Canada recognized the existence of native title at common law in 1973¹, each major native title case has resulted in elaborations of the legal tests required to establish native title at common law.² Prior to the Supreme Court's 1997 decision in *Delgamuukw*, for example, native title claimants were required to prove four elements in order to establish native title to their traditional territories. These four elements, originally outlined by the Federal Court (Trial Division) in *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979]³ and subsequently adopted by the Supreme Court of Canada, were:

1. membership in an organized society;
2. occupation by the organized society of the specific territory over which native title is being claimed;
3. occupation by the organized society of the territory in question to the exclusion of other organized societies; and,
4. proof that the occupation of the territory in question was an establish fact at the time English sovereignty was asserted.⁴

Because this test required native title claimants to prove a system of social organization 'sufficiently evolved' (in European terms) to support a proprietary interest in land

¹ *Calder v Attorney-General of British Columbia* [1973] SCR 313.

² See for example: *Kruger and Manuel v R.* [1978] 1 SCR 104; *Hamlet of Baker Lake v. Minister of Indian Affairs and Northern Development* [1979] 3 CNLR 17; and, *R. v Van der Peet* [1996] 2 SCR 507.

³ *Hamlet of Baker Lake*, *supra* note 2.

cognizable to and defensible under the common law, it has been frequently criticized for being both too restrictive in its application and overtly Eurocentric in its nature.⁵

In its 1997 *Delgamuukw* decision⁶, however, the Supreme Court of Canada outlined a modified version of *Baker Lake* test, notably absent any ‘organized society’ criteria, and elaborated on the legal reasoning supporting this modified test.⁷ As explained in Chief Justice Lamer’s reasons for judgement:

[i]n order to make out a claim for aboriginal title, the aboriginal group asserting title must satisfy the following criteria: (i) the land must have been occupied prior to sovereignty, (ii) if present occupation is relied on as proof of occupation pre-sovereignty, there must be a continuity between present and pre-sovereignty occupation, and (iii) at sovereignty, that occupation must have been exclusive.⁸

According to the *Delgamuukw* test for native title, the group asserting native title is also assumedly required to “specify the area that has been continuously used and occupied by identifying general boundaries.”⁹ Because the *Delgamuukw* test represents Canada’s current judicial native title claims process, each of these four proof criteria will now be examined in turn, followed by a discussion of the ‘evidentiary standards’ to be applied in native title adjudication.

⁴ Thomas Isaac, *Aboriginal Law: Cases, Materials and Commentary* (2nd ed; Saskatoon: Purich Publishing, 1999), p. 11.

⁵ *Ibid*, pp. 97-98

⁶ *Delgamuukw v British Columbia* [1997] 3 SCR 1010.

⁷ According to Isaac: “This may be an implicit recognition by the Supreme Court of Canada not to judge the nature of pre-contact Aboriginal governance structures.” (Thomas Isaac, *Aboriginal Law: Commentary, Cases and Materials* (3rd ed; Saskatoon: Purich Publishing, 2004), p. 19.)

⁸ *Delgamuukw*, *supra* note 6, Lamer CJ at para 143.

⁹ *Ibid*, *per* La Forest and L’Heureux Dubé JJ.

i) The Delgamuukw Test for Native Title

a) Occupancy at Sovereignty

According to the judgement and reasoning proffered by the majority in *Delgamuukw*, in order to demonstrate a judicially defensible native title claim at common law in Canada, “the aboriginal group asserting the claim must establish that it *occupied the lands in question at the time at which the Crown asserted sovereignty over the land subject to the title*”¹⁰ (emphasis added). The identification of ‘sovereignty’ as the appropriate time to consider in native title adjudication serves to distinguish the proof criteria for native title from the proof criteria for aboriginal rights. As was explained in chapter 3, this was considered necessary given the Supreme Court’s determination in *R v Adams* [1996]¹¹ that native title is “simply one manifestation of a broader-based conception of aboriginal rights”¹².

In short, to successfully assert *aboriginal rights* claims in Canada, claimants are required to prove the existence of the aboriginal right(s) in question from ‘the point of *first contact*’ with European newcomers. This proof criterion flows from the fact that aboriginal rights have been determined to find their source in the activities, customs and/or traditions ‘integral to the distinctive cultures’ of Indigenous Peoples.¹³ In sum, practices asserted as ‘aboriginal rights’ must not be introduced or influenced by contact with European settlers, hence the identification of ‘first contact’ as the relevant point of reference in aboriginal rights adjudication.

¹⁰ Ibid, per Lamer CJ and Cory, McLachlin and Major JJ.

¹¹ *R v Adams* [1996] 3 SCR 101.

¹² *Adams*, supra note 11, Lamer at para 25 as quoted by Lamer CJ (at para 137) in *Delgamuukw*, supra note 1.

¹³ See: *Van der Peet*, supra note 2, Lamer at para 46; and, *Delgamuukw*, supra note 6, Lamer CJ at para 50.

In the context of native title, however, the same logic does not apply. As Chief Justice Lamer explained in *Delgamuukw*:

Although this [i.e. central significance to a society's distinctive culture] remains a crucial part of the test for aboriginal rights, given the occupancy requirement in the test for aboriginal title, I cannot imagine a situation where this requirement would actually serve to limit or preclude a title claim. The requirement exists for rights short of title because it is necessary to distinguish between those practices which were central to the culture of claimants and those which were more incidental. However, in the case of title, it would seem clear that any land that was occupied pre-sovereignty, and which the parties have maintained a substantial connection with since then, is sufficiently important to be of central significance to the culture of the claimants. As a result, I do not think it is necessary to include explicitly this element as part of the test for aboriginal title.¹⁴

As was explained in chapter 2, 'sovereignty' (and not the 'point of first contact') has been reasoned to be the most appropriate time to consider in native title litigation because: (i) native title is a burden on the Crown's radical title; (ii) any lands that Indigenous Peoples occupied pre-sovereignty and maintain a substantial connection with today can be considered of central significance to their cultures; and, iii) sovereignty is more certain than the point of first contact.

This judicial reasoning not only reinforces the idea that native title is a pre-existing or inherent right to land that was recognized by the common law (rather than created by the Crown), it also serves to practically limit the degree of historical 'proof of prior occupancy' required of Indigenous land claimants thus facilitating their ability to successfully demonstrate continuing native title. Furthermore, by obviating the need for Indigenous land claimants to explicitly prove that the land(s) under claims are of 'central significance to their People's distinctive culture', this judicial reasoning reinforces the

¹⁴ *Delgamuukw*, *supra* note 6, Lamer CJ at para 151.

initial and historically contingent recognition of indigenous rights to land by treating Indigenous land claimants as potential (if not actual) proprietary land holders (i.e. land owners) with the lawful right to use their traditional territories as they see fit.

Because the source of native title – prior occupancy – is grounded in both the common law and pre-existing Indigenous law, the Canadian courts have reasoned that both should be taken into account in establishing ‘proof of occupancy’.¹⁵ According to the Supreme Court of Canada, ‘physical occupancy’ as a proof criterion for native title finds its legal touchstone in the established principles of the common law. As the majority of the Court explained in *Delgamuukw*: “At common law, the fact of physical occupation is proof of possession in law, which in turn will ground title to the land.”¹⁶ In other words, because proof of ‘physical occupancy’ is sufficient to establish an ‘ordinary’ proprietary title to land at common law, it is also reasoned to be sufficient to establish a *sui generis* native title (which has been reasoned to be uniquely proprietary) at common law. This, again, serves to reinforce the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners.

What then is required of native title claimants to prove their ‘physical occupancy’ of the lands in question at sovereignty? According to the majority in *Delgamuukw*, “occupancy is determined by reference to the activities that have taken place on the land and the uses to which the land has been put by the particular group.”¹⁷ These activities and uses can range from “the construction of dwellings through cultivation and enclosure

¹⁵ See: *Delgamuukw*, *supra* note 6, Lamer CJ and Cory, McLachlin and Major JJ at para 146. Also see precedent in: *Baker Lake v Minister of Indian Affairs and Northern Development* [1980] 1 FC 518 at pp. 561 and 559; and, *R v Van der Peet*, *supra* note 2.

¹⁶ *Delgamuukw*, *supra* note 6, Lamer CJ, and Cory, McLachlin and Major JJ at p. 32.

¹⁷ *Ibid*, Lamer CJ and Cory, McLachlin and Major JJ at para 128.

of fields to regular use of definite tracts of land for hunting, fishing or otherwise exploiting its resource.”¹⁸ According to the majority of the court in *Delgamuukw*, “[i]n considering whether occupation sufficient to ground title is established, the group’s size, manner of life, material resources, and technological abilities, and the lands claimed must be taken into account.”¹⁹ It is thus that pre-existing Indigenous law, and specifically Indigenous perspectives on land and land holding, is factored into the legal reasoning supporting ‘physical occupancy’ as a proof criterion for native title. As explained by Justices La Forest and L’Heureux Dubé in *Delgamuukw*:

when dealing with a claim of ‘aboriginal title’, the court will focus on the occupation and use of the land as part of the aboriginal society’s *traditional way of life*. In pragmatic terms, this means looking at the manner in which the society used the land *to live*, namely to establish villages, to work, to get to work, to hunt, to travel to hunting grounds, to fish, to get to fishing pools, to conduct religious rites, etc. These uses, although limited to the aboriginal society’s traditional way of life, may be exercised in a contemporary manner; see *R v Sparrow*, [1990] 1 SCR 1075 at p. 1099.²⁰

By permitting the contemporary expression of traditional Indigenous land uses to be factored into the proof of native title at common law, the *Delgamuukw* court has explicitly reinforced the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners by recognizing their proprietary right to use traditional land holdings in a variety of manners. To summarize the Court’s reasoning on this point, because native title has been characterized as a unique proprietary landholding at common law and because established common law principles permit ‘ordinary’ proprietary landholdings to be subjected to a variety of land uses as

¹⁸ Ibid, *per* Lamer CJ, and Cory, McLachlin and Major JJ.

¹⁹ Ibid.

well as to a variety of land uses *over time*, the modern expression of traditional Indigenous land uses has been reasoned to be consistent with a continuing native title claim. As was explained in chapter 3, however, “the range of uses [to which lands held under native title may be put] is subject to the limitation that they must not be irreconcilable with the nature of the attachment to the land from which forms the basis of the particular group’s aboriginal title.”²¹ As a result, Indigenous land claimants who have put their traditional territories to uses that are irreconcilable with their Peoples’ ‘traditional way of life’, are unlikely to be able to satisfy the *Delgamuukw* test for continuing native title.

b) Continuity Between Present and Pre-Sovereignty Occupation

Because “[c]onclusive evidence of pre-sovereignty occupation may be difficult to come by”²², the *Delgamuukw* Court concluded that present occupation may serve as proof of pre-sovereignty occupation in a native title claim if there is “a *continuity* between present and pre-sovereignty occupation.”²³ ‘Continuity’ between present and pre-sovereignty occupation is required of native title claimants using present occupation as proof of pre-sovereignty occupation in Canada, “because the relevant time for the determination of aboriginal title is at the time before sovereignty.”²⁴ In other words, because native title to specific tracts of land had to exist pre-sovereignty to be recognized by the common law at sovereignty, native title claimants must prove that their present

²⁰ Ibid, *La Forest and L’Heureux Dubé JJ* at para 194.

²¹ Ibid, Lamer CJ at para 111. Also see: Lamer CJ at paras 117 and 166 in the same.

²² Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 152.

²³ Ibid.

²⁴ Ibid.

occupation of the lands under claim *follows from* their pre-sovereignty occupation of those same lands. This is because the primary *source* of native title is ‘prior occupancy’. In sum, just as ‘ordinary’ proprietary land claimants must reference the source of their lawful titles (i.e. a Crown issued deed or grant or ‘exclusive possession’) in order to prove the validity of their ‘ordinary’ land claims at common law, so too must native title claimants reference the source of their lawful titles (i.e. ‘prior occupancy’/‘occupancy at sovereignty’) in order to prove the validity of their *sui generis* land claims at common law.

It is important to note, however, that an ‘unbroken chain of continuity’ between present and pre-sovereignty occupation need not be established by native title claimants in the Canadian case. As was explained by the majority in *Delgamuukw*:

to impose the requirement of continuity too strictly would risk ‘undermining the very purpose of s. 35(1) [of the *Constitution Act 1982*, which recognizes and affirms ‘aboriginal and treaty rights’,] by perpetuating the historical injustice suffered by aboriginal peoples at the hands of colonizers who failed to respect aboriginal rights to land (*Coté*^[25] ...at para 53).²⁶

As a result, precedent established in the aboriginal rights jurisprudence of Canada suggests that disruptions in occupancy caused by the regular ‘seasonal movements’ of Indigenous Peoples or by temporary ‘environmental circumstances’ (such as limited game in ‘traditional’ hunting territories) are unlikely to nullify a native title claim at common law.²⁷ How more long-term disruptions in occupancy, such as the dislocation and/or forced removal of Indigenous Peoples from their traditional territories by colonial authorities, will be interpreted by the Canadian courts, however, remains unclear.

²⁵ *R v Coté* [1996] 3 SCR 139.

²⁶ *Delgamuukw*, *supra* note 6, Lamer CJ and Cory, McLachlin and Major JJ at para 153.

As Chief Justice Lamer, writing for the majority, asserted in *Delgamuukw*: “[t]he occupation and use of lands [by Indigenous Peoples] may have been disrupted for a time, perhaps as a result of the unwillingness of European colonizers to recognize aboriginal title.”²⁸ Returning to the source of native title, however, this same option adopted the High Court of Australia’s requirement (set down in *Mabo (No 2)*), that there be a “‘substantial maintenance of the connection’ between the people and the land”²⁹ in order to prove native title at common law. In a notable qualification of this requirement, however, the majority justices in *Delgamuukw* asserted that “the fact that the nature of occupation has changed would not normally preclude a claim for aboriginal title as long as substantial connection between the people and the land is maintained.”³⁰ This qualification provides clear recognition of Indigenous Peoples as ‘proprietary’ land owners with the accompanying lawful right to choose to what uses their lands may be put.

As was explained earlier, however, the judicially imposed ‘inherent limit’ of native title significantly restricts the Canadian courts’ flexible approach to ‘continuity’ by requiring that land held pursuant to native title not be put to uses “which are inconsistent with continued use by future generations of aboriginals.”³¹ In other words, if the nature of an Indigenous People’s occupation of its traditional territories has significantly changed since the assertion of sovereignty by the Crown, a native title claim will not be admitted if a court holds that the nature of the present occupation includes or permits land

²⁷ See: *Delgamuukw*, *supra* note 6, *per* Lamer CJ and Cory, McLachlin and Major JJ at p. 32.

²⁸ *Ibid*, Lamer CJ and Cory, McLachlin and Major JJ at para 153.

²⁹ *Ibid*.

³⁰ *Ibid*.

³¹ *Ibid*, Lamer CJ and Cory, McLachlin and Major JJ at para 154.

uses inconsistent with an Indigenous group's 'traditional' attachment to the lands under claim. This limitation flows from the "relationship between the common law which recognizes occupation as proof of possession and systems of aboriginal law pre-existing the assertion of British sovereignty"³² which governed Indigenous land use during the pre-sovereignty period. In sum, because the primary source of native title - 'prior occupancy' – was governed by pre-existing systems of landholding (i.e. aboriginal laws), the *Delgamuukw* justices have reasoned that all lawful uses of native title lands must continue to conform to the pre-existing systems of landholding that governed lawful occupation *cum* possession in the first place. Although this judicial reasoning does serve to freeze lawful indigenous land uses in the past, as was explained by Chief Justice Lamer in *Delgamuukw*::

[T]he law of native title does not only seek to determine the historic rights of aboriginal peoples to land; it also seeks to afford legal protection to prior occupation in the present-day. Implicit in the protection of historic patterns of occupation is a recognition of the importance of the continuity of the relationship of an aboriginal community to its land over time.

... The relevance of the continuity of the relationship of an aboriginal community with its land here is that it applies not only to the past, but to the future as well. That relationship should not be prevented from continuing into the future. As a result, uses of the lands that would threaten that future relationship are, by their very nature, excluded from the content of aboriginal title.³³

³² Ibid, *per* Lamer CJ, and Cory, McLachlin and Major JJ at p. 1014.

³³ Ibid, Lamer CJ at para 126.

c) *Exclusivity*

According to the *Delgamuukw* test of native title, if indigenous land claimants choose to prove ‘occupancy at sovereignty’ in order to establish native title to specific tracts of land they must also prove that their ‘prior occupancy’ of the lands in question was ‘exclusive’. This proof criterion flows from the judicial characterization of native title’s nature (i.e. a *sui generis* proprietary right to land) and content (which includes the proprietary right to ‘exclusive use and occupancy’). As Chief Justice Lamer explained in *Delgamuukw*:

Were it possible to prove title without demonstrating exclusive occupation, the result would be absurd, because it would be possible for more than one aboriginal nation to have aboriginal title over the same piece of land, and then for all of them to attempt to assert the right to exclusive use and occupation over it.³⁴

That having been said, however, the *Delgamuukw* Court also determined that the concept of ‘exclusivity’ (like the conception of ‘occupation’) should be sensitive to the realities of Indigenous societies and flexibly applied. As Chief Justice Lamer explained in his reasons for judgement on this matter:

... it is important to note that exclusive occupation can be demonstrated even if other aboriginal groups were present, or frequented the claimed land. Under those circumstances, exclusivity would be demonstrated by ‘the intention and capacity to retain exclusive control’. Thus an act of trespass, if isolated, would not undermine a general finding of exclusivity, if aboriginal groups intended to and attempted to enforce their exclusive possession.³⁵

This judicial reasoning, flowing as it does from the established common law principle of ‘intent and capacity to retain exclusive control’ that governs ‘ordinary’ proprietary

³⁴ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 155.

³⁵ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 156.

tenures, reinforces the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners. Chief Justice Lamer even went so far as to assert that the presence of other Indigenous Peoples on the land in question might serve to support a native title claim. For example, if permission to access the lands in question was requested of the native title claimants by another Indigenous group or groups it could serve as evidence of the native title claimants' recognized authority over those lands.³⁶ In another instance the presence of other Indigenous Peoples on the land in question might support a determination of 'joint native title' arising from 'shared exclusivity'. As Lamer explains, "[t]he meaning of shared exclusivity is well-known to the common law. Exclusive possession is the right to exclude others. Shared exclusive possession is the right to exclude others except those with whom possession is shared."³⁷ In sum, native title's 'exclusivity' proof criterion has been directly influenced by the established common law principles governing 'ordinary' proprietary tenures, a fact which serves to reinforce the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners.

In the reasoning of the Supreme Court of Canada, however, the *sui generis* character of native title demands that the proof criterion of 'exclusivity', like the proof criterion of 'occupancy', be determined with attention to both the common law and aboriginal law. This is because the source of *sui generis* native title has been identified, at least in part, by the interaction of the common law and aboriginal law. In theory, then, native title claimants need not establish 'exclusive occupancy' according to the same

³⁶ Ibid.

³⁷ Ibid, Lamer CJ and Cory, McLachlin and Major JJ at para 158.

evidentiary standards required of ‘ordinary’ common law title claimants (more will be said on this point in sub-section *e* below).

d) Specificity

In *Delgamuukw*, minority Justices La Forest and L’Heureux Dubé opined that native title claimants must “*specify* the area which has been continuously used and occupied”³⁸ (emphasis original) when asserting a native title claim by identifying the general boundaries of the territory(ies) under claim. Although the opinion of the majority in *Delgamuukw* did not include ‘specificity’ as a proof criterion for native title, it is reasonable to assume that some degree of territorial delineation will be expected of native title claimants by Canadian courts. Supporting this conclusion is that fact that all ‘ordinary’ common law titles and tenures are geographically delimited and the presumption that the common law could not defend native title holders’ right to ‘exclusive use and occupancy’ if the extent of their title did not have some cognizable boundaries. In any case, it seems highly unlikely that any Indigenous People would bring a native title claim before the Canadian courts with out specifying, at least to some degree, the extent of the lands claimed or that a Canadian court would confirm an Indigenous People’s native title to an unspecified area of land. ‘Specificity’, then, is the fourth proof criterion of native title in the Canadian case.

³⁸ Ibid, La Forest and L’Heureux Dubé JJ at para 195.

e) Evidentiary Standards

According to the Supreme Court's majority opinion in *Delgamuukw*, to establish native title at common law native title claimants must prove either: (i) their 'exclusive occupancy' of the territories under claim 'at sovereignty'; or, (ii) that their 'present occupancy' of the territories under claim continues from and is evidence of their pre-sovereignty occupation of the same territories. Establishing 'occupancy', however, may be very difficult for Indigenous Peoples to do given the 'ordinary' evidentiary standards of the common law.

Speaking to the issue of evidentiary standards, Chief Justice Lamer held in *R v Van der Peet* that when a court is adjudicating aboriginal rights claims,

[it] should approach the rules of evidence, and interpret the evidence that exists, with a consciousness of the special nature of Aboriginal claims, and of the evidentiary difficulties in proving a right which originates in time when there were no written records of the practices, customs and traditions engaged in. The courts must not undervalue the evidence presented by Aboriginal claimants simply because that evidence does not conform precisely with the evidentiary standards that would be applied in, for example, a private torts case.³⁹

In *Delgamuukw*, Chief Justice Lamer applied this same credo to the adjudication of native title claims, asserting that native title cases require the courts to

adapt the laws of evidence so that the aboriginal perspective on their practices, customs and traditions and on their relationship with the land, are given due weight by the courts. In practical terms, this requires the courts to come to terms with the oral histories of aboriginal societies, which, for many aboriginal nations, are the only record of their past.⁴⁰

³⁹ *Van der Peet*, *supra* note 2, Lamer CJ at para 68.

⁴⁰ *Delgamuukw*, *supra* note 6, Lamer CJ at para 84.

Although admitting oral history as ‘valid’ evidence at common law pays respect to Indigenous systems of knowledge and may theoretically improve Indigenous Peoples’ ability to successfully assert and defend native title claims in court, it also leaves some critical questions unanswered. For example: do Canadian justices have the *capacity* to understand, interpret and evaluate Indigenous oral histories?; to what evidentiary standards will oral histories be held?; who will design such standards?; and, how will competing or conflicting oral histories be weighed? In sum, *how* Canadian courts will ‘come to terms with the oral histories of aboriginal societies’ has yet to be determined.

That having been said, however, the judicial recognition of the need to apply evidentiary standards in a flexible manner when adjudicating native title claims not only pays credence to the fact that extra-common law systems of landholding governed Indigenous Peoples’ prior occupation of their traditional territories, it also serves to potentially facilitate Indigenous Peoples’ practical ability to successfully litigate their continuing native title claims.

ii) Other Considerations Relevant to the Proof of Native Title at Common Law in the Canadian Case

As this section has demonstrated, the proof of native title at common law in the Canadian case owes significant allegiance to the established common law principles governing ‘ordinary’ proprietary tenures at common law. This reinforces the initial and historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners and, in turn, reinforces the ‘self-reinforcing’ path dependence sequence thesis set forth in the Introduction to this study. Of course, Indigenous Peoples’ ability to

successfully assert native title at common law is not only governed by the judicial proof criteria designed by (post)colonial legal institutions. It is also governed by the financial costs, lengthy time-spans and uncertain outcomes inherently embedded in the Canadian judicial system.

As Murray Angus explains:

Lawyers with specialized expertise in native law seldom come cheaply (legal fees for lawyers representing the government in land claims litigation in [the province of] British Columbia have run as high as \$6,000 per day); court costs can be astronomical (an estimated \$800 per hour); and the depth of legal and historical research required to build a successful case is often far greater than in 'normal' litigation practice.⁴¹

Given that Indigenous Peoples “are not typically endowed with the financial resources needed to engage in lengthy court actions”⁴², the litigated settlement of continuing native title claims is not a realistic option for many (if not most) Indigenous Canadians. This is particularly true given Canadian governments’ almost unlimited access to both financial and legal resources:

Recent records show the federal government has been spending more money to fight native land claims than any other issue. In 1988-89, the law firm that billed the Department of Justice the most money in Canada was Koenigsberg and Russell of Vancouver, whose primary job was to fight three high profile claims in British Columbia. The third highest bill was from MacAuley and McColl, also of Vancouver, which shared the workload on the same three cases. The fourth highest billing came from Black & Co. of Calgary, which represented the government in its negotiation with the Lubicon [Cree]. In short, three of the top four highest billing private law firms in Canada were engaged in fighting aboriginal people in court.⁴³ Aboriginal groups, by comparison, have often had to

⁴¹ Murray Angus, ... *“an the last shall be first”*: *Native Policy in an Era of Cutbacks* (Ottawa: The Aboriginal Rights Coalition (Project North), 1990, p. 59.

⁴² *Ibid*, pp. 59-60.

⁴³ *Canadian Lawyer* (October 1989), pp. 14-15. The article noted: “Native claims pushed fallout from bank failures, urea formaldehyde lawsuits, and even free trade out of the spending spotlight for outside legal services during Ottawa’s most recent fiscal period (April 1, 1988 – March 31, 1989).”

rely on ‘feasts, public appeals, raffles, bingos, etc.’⁴⁴ to raise funds to fully present their cases during even the first round of court action.⁴⁵

Of course, the amount expended on private law firms does not encapsulate the total cost of federal government expenditures on native title litigation:

The Department of Justice maintains its own internal Native Law Section to track and assess events and decisions related to a myriad of issues associated with native law: land rights, treaty rights (pre-Confederation and post-Confederation); hunting rights; resource rights (to fish, timber, wildlife, oil and gas, wild rice); constitutional rights; and taxation. The section provides the government with strategic advice on how to deal with legal actions emanating from the native community. The Department of Justice also maintains a Legal Services Branch within each federal department, including those directly affected by native claims (Indian Affairs, Environment and Fisheries). In Indian Affairs, in particular, so much legal defence work is done that a special Legal Liaison and Support Branch has been created to co-ordinate the government’s response.⁴⁶

In the face of this degree of harnessed legal expertise, it is not surprising that many Indigenous Peoples are leery to pursue a litigated settlement of their continuing native title claims.

In addition to being expensive and requiring a tremendous harnessing of legal expertise, native title litigation is also both time consuming and risky, as the experience of the Teme-Augama Anishnabai, or Bear Island Band, clearly demonstrates. In 1973, the Teme-Augama Anishnabai took the first step towards asserting legal jurisdiction over its traditional territories in north-eastern Ontario. After failed attempts to resolve the dispute through negotiation, however, the case went to trial in the Superior Court of Ontario in 1982. “Two years later, after 119 days of proceedings, the court ruled against

⁴⁴ “Letter to the People of Canada” from Don Ryan, President of the Gitksan-Wet’suwet’en Tribal Council (May 25, 1988).

⁴⁵ Angus (1990), pp. 59-60.

⁴⁶ Ibid, pp. 60-61.

the band's claim^[47]. The band appealed, but it took five more years before the Appeal Court of Ontario issued its ruling^[48], which went against the band."⁴⁹ A final appeal to the Supreme Court of Canada was lodged shortly after the Appeal Court of Ontario's 1989 verdict, but on 15 August 1991 the Supreme Court of Canada upheld the lower courts' decision and dismissed the Teme-Augama Anishnabai's claim of continuing native title.⁵⁰ As a result, after almost two decades of legal research, court costs, and lawyers fees, the Teme-Augama Anishanbai not only lost their legal battle to secure common law recognition of their continuing native title claim but also the hope of regaining rightful jurisdiction over the territories their ancestors had occupied and cared for since time immemorial. In sum, "[t]o 'go for broke' in the courts can mean winning big, but it can also mean losing big, and losing once-and-for-all."⁵¹

As chapter 6 and 7 will explain, however, the Indigenous Peoples of Canada may choose to forgo a costly, lengthy, and uncertain litigated settlement of their continuing native title claims by voluntarily submitting their claims to the Comprehensive Claims Branch of the Claims and Indian Government (CIG) Sector, Department of Indian Affairs and Northern Development (formerly the Office of Native Claims) and engaging in comprehensive claims negotiations with the federal government and other relevant parties. Whether such negotiations hold the potential to meaningful accommodate continuing native title, however, is a matter of some debate.

⁴⁷ *Bear Island Foundation v. Ontario* (1984) 15 DLR (4th) 321 (SCO).

⁴⁸ *Bear Island Foundation v. Ontario* [1989] 2 CNLC 73 (OCA).

⁴⁹ Angus (1990), p. 61.

⁵⁰ *Ontario (Attorney General) v Bear Island Foundation* [1991] 2 SCR 570.

II – PROOF OF NATIVE TITLE AT COMMON LAW: THE AUSTRALIAN CASE

According to the High Court of Australia’s judgement and reasoning in *Mabo (No. 2)*, the incidents of native title are to be ascertained “according to the laws and customs of the indigenous people who, by those laws and customs, have a connection with the land.”⁵² This assumedly requires native title claimants to prove at least two things during the course of court proceedings: (i) that they continue to adhere to their traditional laws and customs; and, (ii) that they continue to maintain a substantial connection to their traditional territories in accordance with their traditional laws and customs. It may also require them to prove that they are members of an indigenous community. Each of these proof criteria will now be discussed in turn, followed by a discussion of the ‘evidentiary standards’ applied by Australian courts in native title adjudication.

i) The Mabo Test for Native Title

a) Continuing Adherence to Traditional Laws and Customs

As explained in Justice Brennan’s reasons for judgement in *Mabo (No. 2)*, “[t]he term ‘native title’ conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, *possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants*”⁵³ (emphasis added). As a result the *Mabo (No. 2)* majority concluded that “[t]he ... incidents of native title must be ascertained as a matter of fact by reference to

⁵¹ Angus (1990), p. 62.

⁵² *Mabo v. State of Queensland (No. 2)* 66 ALJR 408, Brennan J at p. 435.

⁵³ *Ibid*, Brennan J at p. 429.

those laws and customs.”⁵⁴ This means that native title claimants must prove that they continue to adhere to the traditional laws and customs that anchor their special attachment to their traditional territories in order to demonstrate continuing native title.

As Justice Brennan explained in *Mabo (No. 2)*:

[w]here a clan or group has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of that clan or group, whereby their traditional connection with the land has been substantially maintained, the traditional community title of that clan or group can be said to remain in existence. The common law can, by reference to the traditional laws and customs of an indigenous people, identify and protect the native rights and interests to which they give rise.⁵⁵

Although the *Mabo (No. 2)* justices neither elaborated upon *how* native title claimants might go about proving that they continue to acknowledge their traditional laws and observe their traditional customs, nor explained *what* they meant by ‘so far as practicable’, they did opine that “[i]t is immaterial that the laws and customs [of native title claimants] have undergone some change since the Crown acquired sovereignty provided the general nature of the connection between the indigenous people and the land remains.”⁵⁶

⁵⁴ Ibid.

⁵⁵ Ibid, Brennan J at p. 430.

⁵⁶ Ibid, Brennan J at p. 435. Also see: Brennan J at p. 431 in the same.

b) *Continuing Maintenance of a Substantial Connection to Traditional Territories
(In Accordance with Traditional Laws and Customs)*

Equally as important as the adherence to traditional laws and customs for the proof of native title at common law in the Australian case is the maintenance of a substantial connection to the lands in question in accordance with those same laws and customs. In fact, the two proof criteria are practically inseparable. As explained by Justice Brennan in *Mabo (No. 2)*: “[n]ative title to particular land ... its incidents and the persons entitled to it are ascertained according to the laws and customs of the indigenous people who, by those laws and customs, have a connection to the land.”⁵⁷ The *Mabo (No. 2)* justices, however, had very little to say about the nature and degree of connection required to establish native title at common law. It is important to note, however, that the Meriam People’s continuing ‘physical’ connection to their traditional territories seems to have played a central role in the High Court of Australia’s validation of their native title claim. As explained by Justice Brennan in *Mabo [No. 2]*:

Of course, since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connection with it. But that is not the universal position. It is clearly not the position of the Meriam People.⁵⁸

If a continuing ‘physical’ connection to traditional territories is in fact required of native title claimants, the unlawful dispossession and forced dislocation of Indigenous Peoples perpetrated by European newcomers over the course of the past 200 years will likely negatively affect a great number of native title claimants in the Australian case.

⁵⁷ Ibid, Brennan J at pp. 434-435.

⁵⁸ Ibid, Brennan J at p. 430.

c) Membership in an Indigenous Community

In *Mabo (No. 2)*, the majority proffered the opinion that “[t]he term ‘native title’ conveniently describes the interests and rights of *indigenous inhabitants* in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants”⁵⁹ (emphasis added).

As a result, these justices determined that

[w]here a *clan or group* has continued to acknowledge the laws and (so far as practicable) to observe the customs based on the traditions of *that clan or group*, whereby their traditional connection with the land has been substantially maintained, the traditional community title of *that clan or group* can be said to remain in existence. [emphasis added]⁶⁰

Inherent in these statements is the fact that native holders/successful native title claimants must be bone fide members of an indigenous community. Although it would seem commonsensical that a native title claimant who demonstrated adherence to traditional laws and customs and a connection to his/her/their traditional territories (in accordance with those laws and customs) would in fact be a member of an indigenous community, the *Mabo (No. 2)* justices nonetheless offered the opinion that membership in an indigenous community “depends on biological descent from the indigenous people and on mutual recognition of a particular person’s membership by the person and by the elders or other persons enjoying traditional authority among those people.”⁶¹ The lack of detailed comment and/or reasoning on this point, however, suggests that proof of a continuing adherence to traditional laws and customs will, for all intents and purposes, be

⁵⁹ Ibid, Brennan J at p. 429.

⁶⁰ Ibid, Brennan J at p. 430.

⁶¹ Ibid, Brennan J at p. 435.

accepted as proof of membership in an indigenous community (unless, of course, a native title claimant's 'indigenous' heritage is subject to formal challenge at trial).

d) Evidentiary Standards

Unlike the Supreme Court of Canada, which has discussed the unique evidentiary standards that must be applied in native title cases in some detail, the High Court of Australia has said very little the matter. In fact all that can be gleaned on the issue of 'evidentiary standards' from the *Mabo (No. 2)* and *Wik* judgements is that: (i) "[t]he ascertainment [of native title's nature and incidents] may present a problem of considerable difficulty"⁶² to the Australian courts owing to its origins in the traditional laws acknowledged by and the traditional customs observed by Indigenous Peoples; and that (ii) "the recognition of the rights and interest of a sub-group or individual dependent on a communal native title is not precluded by an absence of a communal law to determine a point in contest between rival claimants ... A court may have to act on evidence which lacks specificity in determining a question of that kind."⁶³

These finding suggest that although the High Court of Australia has recognized the necessity of looking to indigenous laws and customs for guidance on native title issues, it has not yet grappled with how it might do this and still remain true to its own laws and customs. As in the Canadian case, then, the High Court of Australia has given itself a tremendous degree of discretion in native title cases without giving serious attention to how it will ensure that this discretion is applied in a fair, honourable and equitable manner.

⁶² Ibid, Brennan J at p. 429.

ii) *Other Considerations Relevant to the Proof of Native Title at Common Law in the Australian Case*

As in the Canadian case, Indigenous Peoples' ability to assert and/or defend their continuing native title claims is dependent not only on the common law 'test' of continuing native title devised by the courts, but also by ancillary practical factors, such as cost, the ability to harness legal and/or anthropological expertise, and the willingness to subject continuing native title claims to intense scrutiny. As Hal Wootten explains:

Governments, miners, pastoralists and developers normally have no trouble in hiring lawyers of their choice who will, within the bounds of professional propriety, do their best to advance their client's case. However, aboriginal claimants are not quite so fortunate, as they have found some of the biggest firms unwilling to act for them, presumably for fear of offending large corporate clients. In addition, as they are publicly funded, there are constraints on the fees Aboriginal litigants can pay, which are unacceptable to some lawyers.⁶⁴

With regards to securing requisite anthropological expertise, however, the boot is frequently on the other foot: "it is corporate clients who complain of the difficulty of retaining anthropologists to assist in fighting Aboriginal claims ... In contrast to legal practice, anthropology is not an adversarial pursuit, but part of a worldwide scholarly discipline in which truth is sought on a cooperative basis."⁶⁵ According to Hal Wootten, however, "[w]hereas the amount of power of knowledge of native title exists in descending order from Aboriginal people to anthropologists to lawyers, the amount of power to define it for official recognition may exist in inverse order in the three

⁶³ Ibid, Brennan J at p. 431.

⁶⁴ Hal Wootten, "The end of dispossession? Anthropologists and lawyers in the native title process" in J. Finlayson and D.E. Smith (eds), *Native Title: Emerging Issues for Research, Policy and Practice*, CAEPR Research Monograph No. 10 (Canberra: CAEPR – ANU, 1995), p. 103.

⁶⁵ Ibid, pp. 103-104.

groups.”⁶⁶ As a result, many Indigenous Peoples are reluctant to ‘go for broke’ in the courts. As McRae, Nettheim and Beacroft explain:

Some commentators suggest that Aboriginal groups are better off consolidating and extending their legal gains rather than pursuing expensive and legally hazardous common law actions. The ALRC Report No. 31 (1986), para 902, comments:

In practice common law claims (such as that in *Mabo’s* case) are likely to do little to satisfy the aspirations of most Aboriginal people for land rights.

This view takes into account the high risk of expensive failure, the limited rights derived from aboriginal title (in particular, it probably yields rights only to occupancy, not ownership ...), and the fact that it is vulnerable to extinguishment by the Crown.⁶⁷

As chapters 6 and 7 will make clear, however, Indigenous Peoples’ ability to successfully assert and defend claims of continuing native title are not significantly improved under the terms of the *Native Title Act, 1993* (as amended by the *Native Title Amendment Act, 1998*). In fact, the proof criteria for native title at common law and in statute are so intrinsically linked as to be practically inseparable.

CONCLUSION

As this chapter has demonstrated, the proof of native title at common law in the Canadian and Australian cases is intimately related to the judicially determined source and nature of common law native title. Given that these aspects of common law native title have been demonstrated to owe significant allegiance to the initial and historically contingent recognition of indigenous rights to land during the early colonial settlement

⁶⁶ Ibid, p. 105.

⁶⁷ H. McRae, G. Nettheim, and L. Beacroft, *Aboriginal Legal Issues* (Sydney: The Law Book Company Ltd., 1991) pp. 102-103.

periods of Canada and Australia (see chapter 3), the conclusion that native title's proof criteria owe significant allegiance to colonial newcomers' recognition of Indigenous Peoples as potential (if not actual) land owners in the Canadian case and to colonial newcomers' recognition of Indigenous Peoples as mere land inhabitants and/or land users in the Australian case should come as no surprise.

In sum, because native title has been characterized as a *sui generis* proprietary interest in land at common law (originating in Indigenous Peoples' prior occupation of their traditional territories) in the Canadian case, the proof of native title at common law has been reasoned to emerge from the intersection of the common law doctrine that occupation give rise to possession in the absence of a better claim to real property and the laws and customs of Indigenous land claimants that gave rise to occupation *cum* possession in the first instance. In Australia, by contrast, because native title has been characterized as a *sui generis* personal interest in land (with possible proprietary aspects) originating in the traditional laws and customs of Indigenous Peoples, the proof of native title at common law has been reasoned to emerge from the traditional laws acknowledge by and the traditional customs observed by Indigenous land claimants as these are received by the common law as proof of legally defensible native title rights, interests and incidents.

As a result, while Canadian Indigenous land claimants must satisfy (post-)colonial legal institutions (i.e. courts) that their traditional relationships with land can substantiate the proof criterion of 'possession' required of 'ordinary' proprietary title holders (subject to somewhat flexible evidentiary standards) in order to successfully litigate a continuing native title claim, Australian Indigenous land claimants must satisfy (post-)colonial legal

institutions that they have traditional laws and customs; that they continue to observe and practice such laws and customs; and that such laws and customs make them the lawful parties to a clearly defined range of native title rights, interests and incidents in order to achieve the same end result.

Furthermore, although both the Supreme Court of Canada and the High Court of Australia have placed themselves in the rather precarious position of authoritatively translating traditional indigenous relationships with land into judicially defensible incidents of continuing native title, the early colonial recognition of indigenous rights to land in Canada and Australia has served to direct such authoritative translation in notably different ways. To explain this last point further, in the Canadian case Indigenous Peoples' initial and historically contingent recognition as potential (if not actual) land owners and the contemporary confirmation of native title as a *sui generis* proprietary interest in land has inspired the Supreme Court of Canada to engage in a translation process that is guided by the proof criterion of 'ordinary' proprietary land rights, subject to the realities of both: (a) Indigenous Peoples' unique relationships with their traditional territories as was (and is) regulated by traditional laws and customs; and, (b) the effect colonial settlement practices have had on Indigenous Peoples, their traditional territories, and Indigenous Peoples' relationship with their traditional territories. In the Australian case, by contrast, Indigenous Peoples' initial and historically contingent recognition as mere land inhabitants and/or land users and the contemporary confirmation of native title as a *sui generis* personal interest in land (with possible proprietary aspects) has inspired the High Court of Australia to engage in a translation process guided by the content of traditional laws that continue to be acknowledged and traditional customs that continue to

be observed by Indigenous land claimants, subject to the realities of: (a) colonial dispossession (i.e. the previous extinguishment/infringement of native title); and, (b) the effect of colonial settlement processes on the traditional laws acknowledged by and the traditional customs observed by Indigenous Peoples.

As the remaining two chapters will now demonstrate, these translation process have significantly influenced the political accommodation of native title in the central government policies of Canada and Australia respectively.

CHAPTER 6

NATIVE TITLE'S ACCOMMODATION IN CENTRAL GOVERNMENT POLICY: CANADA'S COMPREHENSIVE CLAIMS POLICY VERSUS AUSTRALIA'S NATIVE TITLE ACT

As was explained in chapter 2 of this study, the recognition of native title at common law compelled an almost immediate political recognition of native title in Canada and Australia and the introduction of central government policies designed to facilitate the contemporary resolution of continuing native title claims. As the remainder of this study will demonstrate, however, Canada's comprehensive claims policy and Australia's *Native Title Act* represent two significantly different political responses to the recognition of native title at common law as well as two significantly different approaches to the contemporary political accommodation of continuing native title.

Furthermore, as this remainder of this study will also demonstrate, although the practical ability of Indigenous Peoples to assert and defend claims of continuing native title is arguably greater under the terms of Canada's comprehensive claims policy than it is under the terms of Australia's *Native Title Act*, neither policy has significantly

improved Indigenous Peoples' practical ability to secure formal confirmation of continuing native title in the wake of native title recognition at common law.

These findings, it is argued, belie the popular notion that that native title's recognition at common law represents an important, if not monumental, accommodation of indigenous rights to land and add significant additional weight to the self-reinforcing path dependence thesis set forth in the Introduction to this study.

Because Canada's comprehensive claims policy and Australia's *Native Title Act* embody a wide range of procedural norms, practices and protocols, however, it has been necessary to devote two chapters to their comparative analysis. As a result, this chapter will focus attention on those general aspects of the two policies that positively and negatively affect Indigenous Peoples' practical ability to lay claim to continuing native title/continuing native title rights and interests¹, and the following chapter (chapter 7) will focus attention on the internal dynamics of the native title claims process set forth in Canada's comprehensive claims policy and the internal dynamics of the native title determination process set forth in Australia's *Native Title Act*.

To begin this comparative endeavour, however, it is first necessary to understand the general nature and overarching goals of the two policies under study.

¹ The terms 'native title' and 'native title rights and interests' are used interchangeably throughout the *Native Title Act* and are synonymously defined in s. 223 of the Act (see chapter 7). This is presumably a result of the fact that 'indigenous rights' have no independent legal standing in Australian common law (see chapter 3) and the High Court of Australia has determined that *sui generis* native title is properly characterized as a 'bundle of rights' rather than as a 'title to land' (see chapter 4).

I - THE NATURE AND GOALS OF CANADA'S COMPREHENSIVE CLAIMS POLICY AND AUSTRALIA'S NATIVE TITLE ACT

i) Canada's Comprehensive Claims Policy

Introduced in 1973² following the Supreme Court of Canada's recognition of native title at common law in *Calder v. Attorney-General of British Columbia* [1973]³, and subject to relatively minor amendments in 1986⁴ and 1995⁵, Canada's comprehensive claims policy outlines a *non-statutory native title claims process* that permits Indigenous Peoples to negotiate *extra-judicial* settlements of their continuing native title claims with the federal government and other relevant parties. Such settlements are intended to: (i) "address concerns raised by Aboriginal people, governments and third parties about who has the legal right to own or use the lands and resources in areas under claim"⁶; (ii) "clarify the rights of Aboriginal groups to lands and resources, in a manner that will facilitate their economic growth and self-sufficiency"⁷; and, (iii) facilitate the statutory codification and constitutional protection of mutually agreed upon rights, interests, benefits, institutional arrangements and obligations in respect of lands and waters subject to claims of continuing native title.

As was explained in the Department of Indian Affairs' most recent (1993, reprinted in 1998) comprehensive claims policy statement:

² See: Canada, Indian and Northern Affairs Canada, *In All Fairness: A Native Claims Policy, Comprehensive Claims*, (Ottawa: Minister of Supply and Services, 1981).

³ *Calder v. Attorney-General of British Columbia* [1973] SCR 313, 7 CNLC 91 (SCC).

⁴ See: Canada, *Comprehensive Land Claims Policy*, (Ottawa: Minister of Supply and Services, (1987).

⁵ See: Canada, *Federal Policy Guide, Aboriginal Self Government: The Government of Canada's Approach to the Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, (Ottawa: Minister of Indian Affairs and Northern Development, 1995).

⁶ Canada, Indian Affairs and Northern Development, "Comprehensive Claims Branch" (2001), http://www.ainc-inac.gc.ca/ps/clm/ccb_e.html.

⁷ Elaine L. Simpson, "Aboriginal Land Claims in Canada: Modern Treaties (Land Claims)" (2001), <http://www.ualberta.ca/~esimpson/claims/Moderntreaties.html>.

The primary purpose of comprehensive claims settlements is to conclude agreements with Aboriginal groups that will resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title. Uncertainty with respect to the legal status of lands and resources, which has been created by a lack of political agreement with Aboriginal groups, is a barrier to economic development for all Canadians and has hindered the full participation of Aboriginal Peoples in land and resource management ...

Negotiated comprehensive claims settlements provide for the exchange of undefined Aboriginal rights over an area of traditional use and continuing occupancy, for a clearly defined package of rights and benefits codified in a constitutionally protected settlement agreement. The objective is to negotiate modern treaties that provide a clear, certain and long-lasting definition of rights to land and resources.⁸

In sum, the three mutually compatible goals of Canada's comprehensive claims policy are: (i) to reconcile the unlawful dispossession of traditional Indigenous territories with the historic recognition of Indigenous Peoples as lawful land owners⁹ and the contemporary judicial confirmation of native title as a *sui generis* common law real property right; (ii) to facilitate the full and final resolution of continuing native title claims outside of judicial channels; and, (iii) to promote the future social, economic and political development of successful Indigenous land claimants.

As the remainder of this study will make clear, however, this policy has done little to significantly improve Indigenous Peoples' practical ability reconcile their historic (and ongoing) dispossession. This is owing to the fact that the comprehensive claims policy

⁸ Canada, *Federal Policy for the Settlement of Native Claims*, (Ottawa: Minister of Public Works and Government Services Canada, 1993; reprinted 1998), p. 5.

⁹ As was explained in chapter 1, the historic recognition of Indigenous Peoples as lawful land owners was embodied in the terms of the *Royal Proclamation of 1763*, which compelled colonial authorities (and later, the Dominion Government of Canada) to negotiate formal 'land surrender' treaties with Indigenous Peoples in advance of colonial settlement.

represents little more than a contemporary re-articulation of the historic ‘land surrender’ treaty process.¹⁰

ii) Australia’s Native Title Act

Introduced in 1993, following the recognition of native title at common law in *Mabo v State of Queensland (No. 2)* [1992]¹¹ and significantly revised in 1998 in response to important legal developments¹², the *Native Title Act*, by contrast, embodies a *statutory land use regulation regime* that attempts to reconcile 200 years of unhampered colonial settlement with the contemporary revelation that Indigenous Peoples did have (and in fact may still have) judicially defensible rights and interests in respect of their traditional territories.

To achieve the former, the *Native Title Act*: (i) validates all grants of land made and other actions taken without reference to the existence of continuing native title prior to 23 December 1996 (i.e. ‘past acts’ and ‘intermediate period acts’ – see below and chapter 2); and, (ii) implements a formal process for future land dealings that have the potential to effect continuing native title and/or native title rights and interests (i.e. ‘future acts’ – see chapter 2 and chapter 7). To achieve the later, the *Native Title Act* recognizes and protects continuing native title (as defined in s. 223 of the Act itself – see below) and introduces formal statutory processes designed to: (i) facilitate the identification,

¹⁰ As will be recalled from chapter 1 of this study, the historic ‘land surrender’ treaty process required Indigenous land owners to ‘surrender’ their traditional territories to the Crown in exchange for a negotiated package of Crown delegated ‘treaty rights’.

¹¹ *Mabo v State of Queensland (No. 2)* [1992] 66 ALJR 408, 107 ALR 1, 175 CLR 1, 5 CNLR 1.

¹² Namely, the ruling in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 that extra-judicial determinations made by statutory bodies can not be given the force of law through their mere registration with the Federal Court; and, *The Wik Peoples and the Thayorre People v. State of*

determination, and registration of continuing native title claims, continuing native title, and continuing native title rights and interests¹³ (see chapter 7); and, (ii) provide registered Indigenous land claimants and registered native title holders with a statutory ‘right to negotiate’ in respect of most future land dealings that have the potential to affect native title and/or native title rights and interests (see chapter 7).

As explained in s. 3 of the *Native Title Act*, the main objective of this Act are:

- (a) to provide for the recognition and protection of native title [defined in s.223(1) as: “the communal, group or individual rights and interests of Aboriginal people or Torres Strait Islanders in relation to land or waters, where: (a) the rights and interests are possessed under the traditional laws acknowledge by and the traditional customs observed by the Aboriginal peoples or Torres Strait Islands; (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and, (c) the rights and interests are recognised by the common law of Australia]; and
- (b) to establish ways in which future dealing affecting native title [i.e. ‘future acts’] may proceed and set standards for those dealings; and
- (c) to establish a mechanism for determining claims to native title [i.e. through applications made to the Federal Court and reviewed by the Native Title Registrar followed by ‘consent’, ‘mediated’ or ‘litigated’ determinations of the precise nature, content and incidents of continuing native title/native title rights and interest and the registration of continuing native title claims and determinations with the Native Title Registrar]; and
- (d) to provide for, or permit, the validation of past acts [defined in s. 228 of the *Native Title Act* as falling between the coming into effect of the *Racial Discrimination Act, 1975* - 31 October 1975 - and the *Mabo (No. 2)* decision – 1 July 1993]] and intermediate period acts [defined in s. 232A of the *Native Title Act* as falling between the coming into force of the *Native Title Act, 1993* – 1 January 1994 – and the *Wik* decision – 23 December 1996]], invalidated because of the existence of native title.¹⁴

Queensland (1996) 71 ALJR 173 which confirmed that pastoral leases do not necessarily extinguish native title and that the rights of native title holders can co-exist with the rights of common law leaseholders.

¹³ The terms ‘native title’ and ‘native title rights and interests’ are used interchangeably throughout the *NTA* and are synonymously defined in s. 223 of the Act.

¹⁴ *NTA*, sec. 3.

As the remainder of this study will make clear, these four wide-sweeping goals (and their practical manifestation in the native title determination process) reflect the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users as well as the High Court of Australia's characterization of native title as an inherently fragile 'bundle of rights' (rather than relatively robust 'title to land'). As a result, the *Native Title Act* has significantly delimited (rather than significantly expanded) Indigenous Peoples' practical ability assert and defend continuing native title in the wake of native title's recognition at common law.

II - PARTIES TO COMPREHENSIVE CLAIMS NEGOTIATIONS AND NATIVE TITLE DETERMINATIONS

i) The Canadian Case

According to the terms of Canada's comprehensive claims policy, the relevant parties to comprehensive claims negotiations include: the federal government; the provincial/territorial government with jurisdiction over the lands and/or waters subject to a claim of continuing native title; the Indigenous group that claims continuing native title in respect of specific lands and/or waters; any 'third parties' whose interests are directly connected to the lands and/or waters subject to a claim of continuing native title; and, members of the general public. Only the federal government, the relevant provincial/territorial government, and the relevant Indigenous claimant group, however, are directly involved in comprehensive claims negotiations as will now be explained.

In areas of exclusive federal jurisdiction (i.e. the Northwest Territories and the Yukon) formal comprehensive claims negotiations are conducted between the Indigenous

claimant group and the federal government owing to the fact that Territorial lands and resources fall under the jurisdiction of the federal government.¹⁵ Provisions for territorial governments' 'involvement' in such negotiations, however, has been provided in all incarnations of the comprehensive claims policy. As explained in federal government's 1986 policy statement on the comprehensive claims process:

Negotiations in [the Territories] will be bilateral in nature leading to a federally-legislated settlement complimented by territorial legislation as required. Territorial governments will participate fully in the application of land claims policy and in negotiations, under the leadership of the federal government.¹⁶

In areas of non-exclusive federal jurisdiction (i.e. where continuing native title claims are located within provincial, rather than territorial, boundaries), however, the negotiation of comprehensive claims settlements proceeds between the federal government, the relevant Indigenous claimant group, and the relevant provincial government. This is owing to the fact that "most of the land and resources that are the subject of negotiations and that are required for the settlement of comprehensive claims are owned by the province[s] and are under provincial jurisdiction."¹⁷

Although provincial governments are under no *legal* obligation to participate in comprehensive claims negotiations, "[i]t is the position of the federal government that provincial governments must participate in comprehensive claims negotiations and must contribute to the provision of claims benefits to Aboriginal groups."¹⁸ As a result, "the

¹⁵ Federal jurisdiction in respect of the territories is provided for in section 91(1A and 29) of the *Constitution Act, 1867*.

¹⁶ Canada (1987), p. 19. See also: Canada (1981), p. 27; and, Canada (1993; rp. 1998), p. 7.

¹⁷ Canada (1993; rp. 1998), p. 6. Provincial ownership and control of lands and resources is provided for in sections 92(5) and 109 of the *Constitution Act, 1867*.

¹⁸ Canada (1993; rp. 1998), p. 7.

participation of provincial governments in the negotiation of claims within their jurisdiction will be strongly encouraged [by the federal government] and is [considered] essential to any negotiation of settlements involving areas of provincial jurisdiction or provincial lands and resources.”¹⁹ If a provincial government refuses to participate in such negotiations, however, there is little recourse for Indigenous land claimants desiring to resolve their continuing native title claims outside of formal judicial processes (i.e. through litigation).²⁰

It is important to note, however, that excepting the fact that the province of British Columbia refused to participate in the comprehensive claims process from its introduction in 1973 until 1990 (asserting its long-standing position that continuing native title did not exist within its territorial jurisdiction), provincial participation in comprehensive claims negotiations has not been difficult to secure. This can be attributed to the fact that comprehensive claims negotiations have the potential to afford provinces greater input into the nature, scope and content of Indigenous land claims settlements than does the litigation option.²¹

¹⁹ Canada (1987), p. 19.

²⁰ Although Indigenous land claimants may proceed to negotiate settlement issues that do not involve lands and resources within provincial jurisdiction with the federal government (i.e. community self-government, participation in federal resource management programs, etc.), such negotiations will not result in a full and final settlement of the continuing native title claim at issue.

²¹ This having been said, however, only three of the sixteen comprehensive claims agreements (i.e. Final Settlement Agreements or ‘modern treaties’) concluded to date have elicited the consent of a relevant provincial government - the *James Bay and Northern Quebec Agreement, 1975*; the *Northeastern Quebec Agreement, 1978*; and, the *Nisga’a Final Agreement, 2000*. This is a result, at least in part, of the fact that most areas subject to claims of continuing native title lie in the Canadian Territories (see Figure 1). It may also, however, be a result of the fact that provincial governments have been slower to accept the contemporary judicial confirmation of continuing native title and its logical implications. This situation is particularly evident in the province of British Columbia where approximately 90 per cent of provincial lands are potentially subject to claims of continuing native title (see Figure 1). As was explained in chapter 1, this is a result of the fact that the government of British Columbia officially denied the existence of continuing native title within its jurisdiction from the late 1860s until the early 1990s. Although British Columbia now has a province-specific ‘modern treaty’ process that complements the federal government

ii) The Australian Case

In the Australian case, by contrast, although relevant parties to native title determinations always include the applicant²² and a State/Territory Minister (unless a Commonwealth Minister notifies the Court to the contrary)²³, a large number of other parties may also be formally involved in a native title ‘proceeding’ (as the process of arriving at a formal native title determination order is described in the *Native Title Act*). This is owing to the fact that the *Native Title Act* has been designed to ensure a ‘balance’ between the newly recognized native title rights of Indigenous Peoples and the previously confirmed statutory land rights of non-indigenous Australians. As a result, potential parties to native title determinations in the Australian can include any or all of the following:

- any other person claiming to hold native title to any of the area covered by the application;
- any registered native title claimant in relation to any of the area covered by the application;
- any registered native title body corporate in relation to any of the area covered by the application;

comprehensive claims policy, this process’s practical ability to resolve the issue of continuing native title claims remains in doubt. This is owing to the fact that only one ‘modern treaty’ agreement (the *Nisga’a Final Agreement, 2000*) has been concluded in the province of British Columbia since the *BC Treaty Commission* began accepting claims of continuing native title from Indigenous claimant groups in December 1993. As a result, the federal policy’s requirement of provincial participation may, in fact, be limiting Indigenous Peoples’ practical ability to achieve a full and final settlement of continuing native title claims given that the vast majority of continuing native title claims are likely to arise in the province of British Columbia. For more information on claims of continuing native title in the province of British Columbia see: Karen E. Lohead, “Whose Land is it Anyway?: The Long Road to the Nisga’a Treaty” in Robert M. Campbell, Leslie A. Pal and Michael Howlett (eds), *The Real Worlds of Canadian Politics: Cases in Process and Policy* (4th ed; Peterborough: Broadview Press, 2004), Ch. 5; Daniel Raunet, *Without Surrender, Without Consent: A History of the Nisga’a Land Claims* (Vancouver: Douglas & McIntyre, 1996); Christopher McKee, *Treaty Talks in British Columbia: Negotiating a Mutually Beneficial Future* (Vancouver: UBC Press, 1996); and, Paul Tennant, *Aboriginal Peoples and Politics: The Indian Land Question in British Columbia, 1849-1989* (Vancouver: UBC Press, 1990; reprinted 1991, 1992, 1995, and 1997).

²² NTA s. 84(2).

²³ NTA s. 84(4).

- any representative Aboriginal/Torres Strait Island body for any of the area covered by the application;
- any person who, when the application was filed in the Federal Court, held a proprietary interest, in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory;
- the Commonwealth Minister;
- any local government body for any of the area covered by the application;
- if the Native Title Registrar [see chapter 7] considers it appropriate in relation to the person – any person whose interests may be affected by a determination in relation to the application; and,
- any other person whose interests may be affected.²⁴

As a result, it is very difficult to imagine a case in which a claim of continuing native title would proceed through the determination process unopposed by any party identified above. In fact, as of March 2004, only 11 native title determinations (out of a total of 49) were ‘unopposed determinations’, meaning that the only party to the native title determination proceedings was the applicant or that each other party to the native title proceedings notified the Federal Court in writing that s/he did not oppose a native title determination order in lines with, or consistent with, the terms sought by the applicant.²⁵

Somewhat surprisingly, however, a further 26 native title determinations were ‘consent determinations’, meaning that they were achieved when the parties involved came to an agreement about nature, content and incidents of continuing native title on their own or through mediation facilitated by the National Native Title Tribunal²⁶. The

²⁴ See NTA s. 66.

²⁵ See NTA s. 86G(2).

²⁶ “The NNTT [National Native Title Tribunal] is established by part 6 of the Native Title Act. It comprises a President and other presidential members (who must be judges of the Federal Court, former

remaining 12 native title determinations were ‘litigated determinations’ (also known as ‘court ordered determinations’). These were made when an application for a determination of native title was contested and the parties involved could not come to an agreement on the terms of a native title determination order so the Federal Court was obligated to hear the relevant parties’ cases in a trial setting and then make a native title determination order on its own (see chapter 7, Figure 11). (Please note that these different types of native title determinations are discussed in more detail in chapter 7).

The large number of parties potentially involved in Australia’s native title determination process reflects that fact that native title has been characterized as a *sui generis* real property right that is inferior to most ‘ordinary’ common law real property rights (see chapters 3 and 4). As a result, any and all persons who might reasonably be expected to have judicially defensible rights in respect of areas subject to claims of continuing native title are permitted, under the terms of the *Native Title Act*, to either: (i) oppose formal claims of continuing native title, (ii) request the identification of any continuing native title rights and interests that might exist in respect of a specific area (in the absence of a formal native title determination order); (iii) participate in an agreement

judges of any federal court or State or Territory Supreme Court, or have been enrolled as a legal practitioner for 5 years), and other members (who must have special knowledge about land management, dispute resolution or Aboriginal or Torres Strait Islander societies) (s. 110). The NNTT’s functions are performed by its members, or by consultants appointed under s. 131A. Its functions include mediation of native title and compensation claims referred to it by the Federal Court (s. 108(1A)), and assisting or mediating, if requested to do so, under other provisions of the *Native Title Act* (s. 108(1B)) [for example, a request to assist with a statutory access agreement or an indigenous land use agreement (s. 44B(4), and ss. 24BF, 24CF and 24DG). Other applications can be made to the NNTT or the Registrar for determinations: under the right to negotiate process (Division 2 of Part 3); and of objections against the registration of an indigenous land use agreement (Division 2A of Part 3). The NNTT can take into account the cultural and customary concerns of Aboriginal people and Torres Strait Islanders in all its functions, but not so as to unduly prejudice any other party (s. 109(2)). It is not bound by technicalities, legal forms or rules of evidence.” [Australian Government Solicitor, Office of General Counsel, Native Title Unit, “Commentary on the *Native Title Act 1993*” in *Native Title: Native Title Act 1993 and Regulations with Commentary by*

upon continuing native title rights and interests that may be exercised in the future; or (iv) argue against the confirmation of continuing native title/continuing native title rights and interests in a trial-like setting. (See chapter 7 for a more detailed discussion of these options).

These ‘relevant party’ provisions of the *Native Title Act* reflect the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users in that they presume that the judicially defensible rights and interests of Indigenous Peoples in respect of their traditional territories are ‘personal’ land use rights and interests (rather than ‘proprietary’ land ownership rights and interests) and, thus, are inherently vulnerable to lawful extinguishment and/or infringement (see chapter 4). As a result, the native title determination process has been engineered to permit all potential non-native title holders to have their ‘ordinary’ common law rights taken into consideration before a formal determination of continuing native title/continuing native title rights and interests is issued.

It goes without saying, then, that the *Native Title Act's* ‘relevant party’ provisions significantly limits Indigenous Peoples’ practical ability to successfully assert, defend and exercise continuing native title/continuing native title rights and interests in the post-common law recognition period.

III - THE SCOPE OF NATIVE TITLE ACCOMMODATION IN CENTRAL GOVERNMENT POLICY

i) The Canadian Case

According to the Supreme Court of Canada, native title is properly characterized at common law as a *sui generis* proprietary right to land arising from Indigenous Peoples' occupation of their traditional territories prior to the assertion of Crown sovereignty. As a result of this general judicial characterization, native title's nature and content are considered to be matters of *law* in the Canadian case, determined according to the interaction of the common law and traditional Indigenous law(s). As was explained in more detail in chapters 3 and 4, this has led to the following general characterization of native title's nature and content:

Nature of Native Title:

1. native title is a *right to the land itself*²⁷;
2. native title is 'personal' only in the sense that it is *inalienable except by surrender to the Crown*²⁸;
3. native title is a *burden on the Crown's radical title*²⁹;
4. native title is a *communal landholding* that cannot be held by individuals³⁰;
5. native title is *subject to an inherent limit* that prevents native title holders from using native title lands in a manner that is irreconcilable with the nature of their attachment to those lands; and³¹,

Australian Government Solicitor, 1993), p. 52].

²⁷ See: *Delgamuukw v British Columbia* [1997] 3 SCR 1010, *per* Lamer CJ, and Cory, McLachlin and Major JJ; Lamer at para 113 and 138; and, *per* La Forest and L'Heureux Dubé.

²⁸ See: *Delgamuukw*, *supra* note 27, Lamer CJ at para 113.

²⁹ See: *Delgamuukw*, *supra* note 27, Lamer CJ at para 145.

³⁰ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer CJ at para 115.

³¹ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 111, 125, 130 and 131.

6. native title *likely can not be revived once validly extinguished* (i.e. by a valid government action) but is *likely capable of revival if temporarily 'lost'* (i.e. through a broken chain of continuity between present and pre-sovereignty occupancy)³².

Content of Native Title:

1. native title encompasses the proprietary right to *exclusive use and occupancy* of the land held pursuant to that title for a variety of purposes³³;
2. native title encompasses the proprietary right to *choose to what uses land can be put* (the use and occupancy of land held pursuant to native title are not restricted to aspects of Indigenous practices, customs and traditions which are integral to distinctive Indigenous cultures)³⁴;
3. the right to choose to what uses land held pursuant to native title can be put is subject to native title's *inherent limit*³⁵;
4. native title encompasses *mineral rights* and the lands held pursuant to native title are capable of exploitation (subject to native title's inherent limitation)³⁶;
5. lands held pursuant to native title are recognized by the common law as having an *inescapable economic component*³⁷; and,
6. lands held pursuant to native title are recognized by the common law as having *non-economic or inherent value* in and of themselves³⁸.

³² Although the Canadian courts have not directly considered the matter of revival of native title following extinguishment, the legal reasoning applied by the High Court of Australia in *Mabo (No. 2)* and *Wik* on the issue of revival is equally applicable to the Canadian case in principle: when native title is extinguished (by valid acts of government) the Crown's radical title expands to a *plenum dominium*. Subsequent to this expansion of the Crown's title, the common law recognises all interests in land as with held *by* the Crown or *of* the Crown by virtue of a grant.

By virtue of the reasoning proffered in *Delgamuukw* (*supra* note 27) that "[a]n unbroken chain of continuity need not be established between present and prior occupation" (emphasis added) [*per* Lamer CJ and Cory, McLachlin and Major JJ at p. 1016], however, the Supreme Court of Canada left open the possibility that native title can be revived after or, more precisely, cannot be 'lost' due to temporary gaps in physical occupation (the fact of which ground native title in common law, at least in part).

³³ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ and Cory, McLachlin and Major JJ; and Lamer at paras 117 and 166.

³⁴ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 111, 117 and 166.

³⁵ See: *Delgamuukw*, *supra* note 27, Lamer CJ at paras 111, 117, 125-128, and 166.

³⁶ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ, and Cory, McLachlin and Major JJ; and, Lamer CJ at para 112.

³⁷ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ, and Cory, McLachlin and Major JJ; and, Lamer CJ at paras 166 and 169.

³⁸ See: *Delgamuukw*, *supra* note 27, *per* Lamer CJ, and Cory, McLachlin and Major JJ.

As a result of this general judicial characterization of native title, the range of issues currently amenable to negotiation under the auspices of Canada's comprehensive claims policy includes:

- full ownership of (i.e. 'ordinary' common law title to) defined tracts of land³⁹;
- preferential and/or exclusive wildlife harvesting rights (including harvesting rights in offshore areas);
- guaranteed participation in land, water, wildlife and environmental management (through membership on advisory committees, boards and similar bodies or through participation in government bodies that have decision-making powers);
- subsurface rights;
- financial compensation (for lost lands and resources)⁴⁰; and,
- resources revenue-sharing arrangements^{41 42}.

This range of issues reflects the fact that negotiated Final Settlement Agreements (i.e. 'modern treaties') are intended to facilitate a "fair and equitable resolution of [continuing native title] claims"⁴³ that will "resolve the debates and legal ambiguities associated with the common law concept of Aboriginal rights and title."⁴⁴ It also,

³⁹ "Lands selected by beneficiaries for their continuing use should be traditional terrestrial lands that are currently used and occupied." [Canada (1987), p. 12].

⁴⁰ "Monetary compensation may comprise various forms of capital transfers, including cash, resource revenue-sharing, or government bonds ... The amount of compensation may be adjusted depending upon other arrangements negotiated in settlement agreements. For example, the amount of cash compensation may be reduced in accordance with arrangements concerning resource revenue-sharing. Outstanding debts owed by the claimant group to the federal Crown [i.e. loans made to the claimant group to facilitate comprehensive claims negotiations] will be deducted from final settlements." [Canada (1987), p. 15].

⁴¹ "Resource revenue-sharing arrangements will not imply resource ownership rights, and will not result in the establishment of joint management boards to manage subsurface and sub-sea resources. In addition, the federal government will maintain responsibility for resource revenue instruments and must maintain its ability to adjust the fiscal regime. Resource revenue-sharing may be subject to limitations either by (i) an absolute dollar cap; (ii) a time cap of not less than fifty years from the first payment of the royalty share (which arrangements will be renegotiable); or (iii) a reducing percentage of royalties generated." [Canada (1987), p. 14].

⁴² See: Canada (1981); Canada (1987); Canada (1993; rp. 1998); and, Canada, Indian and Northern Affairs Canada, "Comprehensive Claims (Modern Treaties) in Canada", *Information Sheet* (March 1996), available at: http://www.ainc-inac.gc.ca/pr/info/trty_e.html.

⁴³ Canada (1987), p. 5.

⁴⁴ Canada (1993; rp. 1998), p. 5.

however, reflects the pre-existing practice of including ‘reserved tracts of land’, ‘continuing livelihood provisions’ and ‘compensation payments’ in the terms of historic ‘land surrender’ treaties (see chapter 1).

Because Canada’s comprehensive claims policy is also designed to “encourage self-reliance and economic development as well as cultural and social well-being [on the part of Indigenous land claimants]”⁴⁵, however, the comprehensive claims policy also permits the following issues to be the subject of comprehensive claims negotiations:

- specific measures to stimulate economic and social development;
- defined roles in the management of heritage resources and parks;
- local or municipal-styled administrative rights; and,
- constitutionally protected aboriginal self-government provisions (where appropriate).⁴⁶

Although this range of issues may seem novel, it is, in fact, largely consistent with both the inclusion of ‘economic development’ provisions in the terms of historic ‘land surrender’ treaties (i.e. the rights to farming implements, cattle, ammunition, etc.) as well as the recognition of Indigenous Peoples as ‘self-governing’ Peoples in the *Royal Proclamation of 1763* (i.e. “... *the several Nations or Tribes of Indians with whom We are connected ...*”) (see chapter 1).

In sum, although the range of issues potentially amenable to negotiation under the terms of Canada’s comprehensive claims policy can certainly provide successful Indigenous land claimants with some important rights, interests and ‘benefits’, it can not be meaningfully depicted as representing a significant departure from the range of issues amenable to negotiation under the terms of the historic ‘land surrender’ treaty process.

⁴⁵ Canada (1987), pp. 9-10.

⁴⁶ See: Canada (1981); Canada (1987); Canada (1993; rp 1998); and, Canada (1996).

ii) The Australian Case

As was explained in chapters 3 and 4 of this study, the High Court of Australia has determined that the rights and interests of Indigenous Peoples' in respect of their traditional territories (i.e. native title) are properly characterized at common law *sui generis* personal interests in land that reflect the lawful entitlements of Indigenous Peoples in respect of lands and waters in accordance with their traditional laws and/or customs. As a result of this general judicial characterization of native title, the nature and content of this *sui generis* real property right in any given instance are considered to be matters of *fact*, to be determined by reference to the traditional laws acknowledged by and traditional customs observed by Indigenous land claimants. Accordingly, there has been no general judicial statement on the content of native title in the Australia case. To summarize what was explained in more detail in chapter 3:

Every instance of native title is different. A title might confer exclusive occupation and use of land, or more limited rights of occupation and use. It might include the right to occupy, maintain and manage an area of land, the right to hunt, fish and gather, the right to access the land, the right to make decisions about access to land, the right to preserve sites of significance, the right to engage in trade, and the right to conserve and safeguard the natural resources of an area. Different titles might be exercised with different degrees of exclusivity in relation to non-native title interests in a given geographical area. Furthermore, the identity of native title group members, and the manner in which they may exercise their native title rights and interests, may be defined in different ways.⁴⁷

Furthermore, because native title is presumed to owe its origins to the traditional laws and customs of Indigenous Peoples, the inherent nature of this *sui generis* real

⁴⁷ Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press, 2000), p. 44.

property right has been characterized in only the most general of terms by the High Court of Australia:

1. native title is *not a right to the land itself* (it is a *sui generis* personal interest, with possible proprietary aspects, and is properly characterized as a ‘bundle of rights’^{48,49});
2. native title is a *burden on the Crown’s radical title*⁵⁰;
3. native title is *inalienable* except by surrender to the Crown⁵¹; and,
4. native title is *not capable of revival* once extinguished (i.e. by a valid act of government)⁵² or ‘lost’(i.e. by the abandoning of Indigenous laws and customs; through a loss of connection to traditional territories; and/or upon the death of the last member of the Indigenous group concerned)⁵³.

As was explained in chapters 3, 4 and 5, this general judicial characterization of native title reflects the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users in that it assumes that the connection between Indigenous Peoples and their traditional territories is predicated upon the uses to which specific tracts of land/bodies of water may be put (in accordance with traditional

⁴⁸ “The characterisation of native title as a separable ‘bundle’ of individual and unrelated rights allows for the removal of individual rights from the ‘bundle’ by Crown acts that are inconsistent with that particular exercise of native title. This ‘bundle’ may then be progressively reduced by the cumulative effect of a succession of different grants [see: *Western Australia v Ward* [2002] HCA 28, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95] Over time, this process may lead to such extensive extinguishment that ‘a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced that the rights which remain no longer have that character’ [Ibid]. The result of this approach is that native title is extremely susceptible to every small incursion and may only ever decrease in strength.” [Phillipa Hetherington, “2001: A Native Title Odyssey”, *Indigenous Law Bulletin* 5:4 (Nov/Dec 2000), p. 16-17.]

⁴⁹ See: *Mabo v. State of Queensland (No. 2)* [1992] 66 ALJR 408, Brennan J at pp. 31-432; and, Deane and Gaudron JJ at pp. 443 and 452; *The Wik Peoples and the Thayorre People v. State of Queensland* (1996) 71 ALJR 173, Kirby J at p. 257; and, *Western Australia v Ward* [2002] HCA 28, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.

⁵⁰ See: *Mabo (No. 2)*, *supra* note 49, *per* Brennan J and Mason CJ and McHugh J at p 409; *per* Deane and Gaudron JJ at p. 409; Brennan J at p. 426; and, Toohey J at p. 496.

⁵¹ See: *Mabo (No. 2)*, *supra* note 49, Brennan J at pp. 426 and 430; and, Deane and Gaudron JJ at pp. 442 and 452.

⁵² See: *Wik*, *supra* note 49, Brennan J at pp. 155, 157 and 160.

⁵³ See: *Mabo (No. 2)*, *supra* note 49, Brennan J at p. 430.

laws and customs) rather than upon fixed proprietorship. As will now be demonstrated, this assumption has been directly imported into the terms of Australia's *Native Title Act*.

According to s. 223 of the *Native Title Act* the terms 'native title' and 'native title rights and interests' mean:

the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law.⁵⁴

As a result, only those rights and interests that can be proven to be: (a) derived from *acknowledged* traditional laws and/or *observed* traditional customs; and, (b) judicially defensible, can receive the 'recognition and protection' afforded by the s. 3(a) of the *Native Title Act* and then only *if* those persons/groups laying claim to such rights and interests can demonstrate an ongoing connection (physical or otherwise) to the land and/or water over which they purport to have continuing native title/continuing native title rights and interests. As a result, the scope of native title accommodation afforded by the *Native Title Act* extends only to those rights and interests that are *judicially defensible*, meaning that they can pass the onerous common law test of continuing native title described in chapter 5.

As Mantziaris and Martin have recently argued, however, "[d]espite the growth in native title case law and the deluge of academic writing ... there is still no solid account

⁵⁴ NTA, s. 223(1).

of the nature and methods by which [native title's] content is defined.”⁵⁵ As a result, what is recognized and protected by the *Native Title Act* is ultimately dependent upon the terms of formal native title determination orders made under the auspices of the *Native Title Act* (see chapter 7).⁵⁶ This reflects the imperial laws and colonial policies that governed Indigenous land acquisition practices during Australia's early years of colonial settlement.

According to these laws and policies, Indigenous Peoples' rights and interests in respect of their traditional territories were only considered to be relevant insofar as such rights and interests could be recognized by the common law (which was determined, at that time, to be never). Although such rights and interest are now (i.e. in the post-*Mabo (No. 2)* decision era) considered to *potentially* exist, the judicial characterization of native title's vulnerability to lawful extinguishment (see chapter 4) coupled with the *Native Title Act's* 'validation' of a wide range of unlawful extinguishing and infringing acts (see chapters 3 and 7) have ensured that continuing native title/continuing native title rights and interests are only effectively relevant insofar as they do not impose significant impediments upon the past, present and future uses of land by non-indigenous people.

⁵⁵ Mantziaris and Martin (2000), p. xviii.

⁵⁶ According to s. 225 of the NTA such orders must identify: (a) the persons, or each group of persons, holding the common or group rights comprising the native title; (b) the nature and extent of native title rights and interests to the determination area; (c) the nature and extent of any other interests in relation to the determination area; (d) the relationship between rights and interests in (b) and (c) (taking into account the effect of the NTA); and, specify (e) the extent to which the native title rights and interests identified in (b) confer possession, occupation, use and enjoyment of the land or waters on the native title holders to the exclusion of all others.

IV - COMPREHENSIVE CLAIMS, NATIVE TITLE DETERMINATIONS AND NATIVE TITLE'S VULNERABILITY TO LAWFUL EXTINGUISHMENT AND INFRINGEMENT

Variations in the judicial characterization of native title's source, nature and content, described in the previous section of this chapter, have had important implications for the vulnerability of native title at common law, with native title being much more susceptible to lawful extinguishment and infringement in the Australian case than it is in the Canadian case (see Figure 10). As will now be explained, this has also had a significant negative effect on the degree of political accommodation afforded native title in Canada's comprehensive claims policy and Australia's *Native Title Act* respectively.

Figure 10 - Native Title's Vulnerability to Lawful Extinguishment and Infringement

	Canada	Australia
Native Title's Vulnerability to Extinguishment and Infringement	<p><u>Sovereignty to 1982:</u> Native title could be extinguished and/or infringed by:</p> <ul style="list-style-type: none"> • voluntary surrender; or, • ordinary federal legislation evincing a 'clear and plain' intention to extinguish and/or infringe native title <p><u>1982 to Present:</u> Native title can be <i>extinguished</i> by:</p> <ul style="list-style-type: none"> • voluntary surrender <p>Native title can be <i>infringed</i> (but not extinguished) by:</p> <ul style="list-style-type: none"> • ordinary federal or provincial legislation, subject to a two-pronged justification test 	<p><u>Sovereignty to Present:</u> Native title can be extinguished and/or infringed by:</p> <ul style="list-style-type: none"> • voluntary surrender; • laws or acts with clear and plain intention to extinguish/infringe native title; • inconsistent statutory grants to third parties (but pastoral leases do not necessarily extinguish native title) • Crown appropriations; • loss of connection to the land through the abandoning of traditional laws and customs; or, • extinction of the relevant clan or group

i) The Canadian Case

As will be explained in more detail in chapter 7, the process of negotiating an extra-judicial settlement of continuing native title claims in the Canadian case is initiated when an Indigenous claimant group presents a formal ‘Statement of Claim’ to the Comprehensive Claims Branch of the federal Department of Indian Affairs and Northern Development (DIAND). This statement must provide evidence that the Indigenous group in question continues to hold lawful native title to the lands in question and accordingly must not include areas over which native title has already been extinguished. Given native title’s relatively robust resistance to lawful extinguishment during both the pre- and post-1982 periods, however, the potential for continuing native title to exist where no treaty agreements have previously been concluded is relative great. As a result, the areas amenable to comprehensive claims negotiations are relatively large (compared to the Australian case), involving, as they do, all areas of that that have not been the subject of historic ‘land surrender’ treaties. (See chapter 1, Figure 1 – ‘Map of Historic Indian Treaties’).

It is important to remember, however, that because the federal government is committed to achieving a full and final settlement of continuing native title claims through the process of comprehensive claims negotiations, all Final Settlement Agreements must contain a clause in which Indigenous land claimants either: (i) ‘cede, surrender and release’ finally and forever, whatever native title and aboriginal rights they might have in exchange for the rights, interests and benefits contained in their Final Settlement Agreement; or, (ii) agree that any native title and aboriginal rights they might have will only be defensible insofar as they are not inconsistent with the terms of their

Final Settlement Agreement.⁵⁷ As a result, the comprehensive claims process does little to improve upon the historical ‘land surrender’ treaty process as far as Indigenous land claimants are concerned. Furthermore, given that many Indigenous Peoples assert that their ancestors were not in fact aware that they were ‘surrendering’ their traditional territories when they concluded so-called historic ‘land surrender’ treaties (see chapter 2), the fact that the comprehensive claims policy does not allow claims of continuing native title to be pursued over lands and waters subject to historic ‘land surrender’ treaties has been a bone of contention between Indigenous Peoples and the federal government since the comprehensive claims policy was introduced in 1973.⁵⁸

ii) The Australian Case

In the Australian case, by contrast, native title’s resistance to lawful extinguishment is relatively weak and, as a result, the following areas can not be included in a native title determination application:

- privately owned land (including family homes, and privately owned freehold farms);
- land covered by residential, commercial and certain other leases;
- some Crown reserves vested in bodies such as local governments or statutory authorities; and,

⁵⁷ See: Canada (1987), p. 11-12; and, Canada (1993; rp. 1998), p.9. It is this aspect of Canada’s comprehensive claims policy that has attracted some of the most vehement criticism from Indigenous people who balk at the idea that their judicially defensible aboriginal rights and native title can be legislated out of existence in order to satisfy the self-serving interests of Canadian governments and/or non-Indigenous people.

⁵⁸ See: National Aboriginal Document Database, Land Claims Issues, Claims Policies, “Inadequacies of the Federal Claims Policies” http://www.landclaimsdocs.com/pol_inadeq.htm (retrieved 6/25/2002); UBCIC, “Certainty: Canada’s Struggle to Extinguish Aboriginal Title” (Vancouver: Union of British Columbia Indian Chiefs, 1998), available at: <http://www.ubcic.bc.ca/certainty.htm>; and, UBCIC, “Aboriginal Title Implementation”, (Vancouver: Union of British Columbia Indian Chiefs, 1998), available at: <http://www.ubcic.bc.ca/implementation.htm>.

- areas where governments have built roads, schools and undertaken other public works.⁵⁹

This leaves the only following areas open to claims of continuing native title:

- vacant (i.e. unallocated) Crown land;
- some state forests, national parks and public reserves (depending on the effect of state or territory legislation establishing and possibly vesting those parks and reserves);
- oceans, seas, reefs, lakes and inland waters; and
- some leases, such as non-exclusive pastoral and agricultural leases (depending on the state or territory legislation they were issued under).⁶⁰

Furthermore, because the *Native Title Act* only serves to recognize and protect native title where:

- (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
- (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
- (c) the rights and interests are recognized by the common law⁶¹,

the abandoning of traditional laws and customs and/or a loss of connection to traditional territories will result in either an unsuccessful native title determination application or, in the event that this abandoning or loss occurs at a later date, a revised native title determination that revokes previously confirmed native title recognition and protection (see chapter 7).

⁵⁹ National Native Title Tribunal (2003a), "What kinds of areas can be claimed in a native title application?", Fact Sheet No. 1b (June), http://www.nntt.gov.au/publications/1036375662_1544.html (retrieved: 2004/03/29).

⁶⁰ Ibid.

⁶¹ NTA, s. 223(1).

Furthermore, given that native title has been characterized by the High Court as a ‘bundle of rights’⁶² it is inherently fragile and susceptible to degradation over time (see chapter 4). As Hal Wootten explains:

On this view ... Aboriginal people were never ‘owners’ of their lands, but just users of land, and only the right to continue their traditional uses, for example rights to traverse the land, hunt on it, to perform ceremonies on it, presumably to defecate and urinate on it, but not to mine it or run cattle on it [are recognized and protected]. On this view, the land belonged to no one – we are back to *terra nullius* with grafted on to it a few superficial usufructuary rights which may become of decreasing importance or be abandoned as Aboriginal people are drawn more into the western economy and western lifestyle.⁶³

It goes without saying that, then, that degree of political accommodation afforded native title in Australia’s *Native Title Act* is not only significantly limited but also represents a substantial reinforcement of the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users. As a result, Indigenous Peoples do not have a significantly improved ability to assert, defend and protect their traditional territories against non-indigenous encroachments under the terms of the *Native Title Act* (when compared with their ability to do the same during the pre-common law recognition era).

⁶² See: *Western Australia v Ward*, *supra* note 49, Gleeson CJ, Gaudron, Gummow and Hayne JJ at paras 76 and 95.

⁶³ Hal Wootten, “The end of dispossession? Anthropologists and lawyers in the native title process” in *Native Title: Emerging Issues for Research, Policy and Practice*, J. Finlayson and D.E. Smith (eds), CAEPR Research Monograph No. 10 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University, 1995), p. 109. According to Wootten (1995), the concept of native title as a ‘bundle of rights’ defined by previous use is based on a misreading of *Mabo (No. 2)* as well as by a misunderstanding of indigenous relationships with land. “The *Mabo* judgement says that Aboriginal rights are defined not by use, but by a system of law and custom – just as the rights of freeholders and leaseholders depend not on the use they make or have made of the land, but on what the relevant system of law says are their rights.” [p. 110].

V - FINANCING COMPREHENSIVE CLAIMS AND NATIVE TITLE DETERMINATIONS

i) The Canadian Case

As explained in the Canadian Government's 1981 policy statement on comprehensive claims, "potential claimant groups requiring assistance in the preparation of a claim will be given straightforward indications of the many aspects of settlement that may need to be considered and upon which the government is prepared to proceed."⁶⁴ Further provisions of the policy, however, assert that although "[c]laimant groups should have enough money to develop and negotiate their claims" spending restraints and limits on the federal government be "kept in mind" with respect to federal government funding of comprehensive claims activities.⁶⁵ As a result, the amount of financial support offered to Indigenous claimant groups is a matter of discretionary federal authority (see chapter 7 for Indigenous Peoples' objections to this aspect of the comprehensive claims policy).

In practice, however, most federal government funding of comprehensive claims activities is provided to Indigenous land claimants in the form of government loans. Such loans are provided interest free until an Agreement-in-Principle is initialed by all relevant parties and are subject to repayment after a Final Settlement Agreement has been successfully concluded. Although repayment terms may be specified in the terms of the Final Settlement Agreement itself, the outstanding debts of successful Indigenous claimant groups are normally deducted from any resource royalties and/or financial compensation that were determined to be owing to them during the course of formal negotiations.⁶⁶

⁶⁴ Canada (1981), p. 27.

⁶⁵ Ibid.

⁶⁶ Canada (1987), p. 15.

If an Indigenous group withdraws from comprehensive claims negotiations, however, its outstanding loans must be repaid immediately and with interest. This results from the fact that the overarching goal of the comprehensive claims policy and of comprehensive claims negotiations is to facilitate a 'full and final' settlement of continuing native title claims. As a result, the federal government is not willing to bear the costs if an Indigenous group determines that its claim is better resolved outside of the comprehensive claims policy (i.e. through litigation). As a result, the decision to enter into comprehensive claims negotiations must not be taken lightly by prospective Indigenous land claimants.

ii) The Australian Case

In the Australian case, by contrast, funding for 'claimant applications' is provided by the Commonwealth government through a statutory body known as ATSIC (the Aboriginal and Torres Strait Islander Commission). This funding is then distributed to a series of regionally based Native Title Representative Bodies (NTRBs) (incorporated Indigenous representative bodies recognised, but not created, by the *Native Title Act*), for use in fulfilling the following statutory functions:

- (a) facilitat[ing] the researching, preparation or making of applications, by individuals or groups from among Aboriginal peoples or Torres Strait Islanders, for determinations of native title or for compensation of acts affecting native title;
- (b) assist[ing] in the resolution of disagreements among such individuals or groups about the making of applications;
- (c) assist[ing] such individuals or groups by representing them, if requested to do so, in negotiations and proceedings relating to:
 - (i) the doing of acts affecting native title; or
 - (ii) the provision of compensation in relation to such acts; or

- (iii) indigenous land use agreements or other agreements in relation to native title⁶⁷; or
 - (iv) rights of access conferred under this Act or otherwise; or
 - (v) any other matter relevant to the operation of this Act;
- (d) certify[ing], in writing, applications for determinations of native title relating to areas of land or waters wholly or partly within the area in relation to which the representative body has been determined to be a representative body;
 - (e) certify[ing], in writing, applications for registration of indigenous land use agreements relating to areas of land or waters wholly or partly within the area in relation to which the representative body has been determined to be a representative body; and
 - (f) become[ing] a party to indigenous land use agreement.⁶⁸

In sum, it is NTRBs who ultimately control the amount of funding provided to individual native title claimant groups.

Although this funding is not required to be repaid by native title claimants, “[t]he chronic under-funding of [NTRBs] is leading to Aboriginal people being deprived of their rights and almost certainly to the extinguishment of native title.”⁶⁹ For example, in 1999 the Love Rashid Report on Native Title Representative Bodies concluded that ‘NTRBs will not be capable of professionally discharging their functions within the current funding framework’ and that ‘there is a national level of under-funding of about 30 million per annum’.⁷⁰ As a result, “NTRBs find themselves caught in a deadly

⁶⁷ “The NTA provides for a range of alternative procedures to settle native title claims, including provision for agreements rather than litigation or mediation ... Under the original legislation of 1993 these were known as Regional Agreements and provided for claimants, non-claimants and governments to solve native title issues and register these agreements with the National Native Title Tribunal. Under the 1998 amends these agreements are known as Indigenous Land Use Agreements (ILUAs).” [D.P. Pollack (2001), “Indigenous Land Use in Australia: A Quantitative Assessment of Indigenous Land Holdings in 2000”, CAEPR Discussion Paper No. 221 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University), p. 17].

⁶⁸ NTA s. 202(4).

⁶⁹ David Ritter, “You get what you pay for”, *Indigenous Law Bulletin* 5:9 (2001), p. 14.

⁷⁰ ATSIC, Native Title Program (1999), *Review of the Native Title Representative Bodies*, p. 43, as referenced in Ritter (2001), p. 14.

crossfire of underfunding and over-regulation.”⁷¹ The certain losers are Indigenous land claimants, as Julie Finlayson explains: “NTRBs are not required to process all claims in their regions; [as a result] their involvement in any claim ... must be weighted up against their own organisational capacity to respond.”⁷² As a result, at least some Indigenous land claimants will undoubtedly be unable to access the resources necessary to prepare a native title determination application and/or defend their continuing native title claim in native title determination proceedings.

CONCLUSION

As this chapter has demonstrated, Canada’s comprehensive claims policy and Australia’s *Native Title Act* represent two significantly different responses to the recognition of native title at common law as well as two significantly different approaches to the contemporary political accommodation of continuing native title. As this chapter has also demonstrate, however, neither policy has significantly improved Indigenous Peoples’ practical ability to assert and defend continuing native title in the post-common law recognition era. This is owing to the fact that both policies take the initial and historically contingent recognition of indigenous rights to land (and their manifestation in early colonial land acquisition policies) as their fundamental starting points.

As the following chapter will now explain, however, the intricacies of Canada’s comprehensive claims process and Australia’s native title determination process only

⁷¹ Ritter (2001), p. 14.

compound the difficulties Indigenous Peoples face when attempting to secure formal recognition of continuing native title/continuing native title rights and interests under the auspices of (post-)colonial claims policies.

⁷² J. Finlayson (1997), "Native Title Representative Bodies: The Challenges of Strategic Planning", CAEPR Discussion Paper No. 129 (Canberra: Centre for Aboriginal Economic Policy Research, Australian National University), p. 12.

CHAPTER 7

PRACTICAL LIMITATIONS TO THE FORMAL ACCOMMODATION OF NATIVE TITLE IN CENTRAL GOVERNMENT POLICY:

CANADA'S COMPREHENSIVE CLAIMS PROCESS VERSUS AUSTRALIA'S NATIVE TITLE DETERMINATION PROCESS

As chapter 6 has already begun to demonstrate, Canada's comprehensive claims policy and Australia's *Native Title Act* represent two significantly different approaches to the contemporary political accommodation of continuing native title. As this chapter will now demonstrate, these two policies also provide significantly different contexts for the assertion of continuing native title claims. In sum, while Canada's comprehensive claims process represents a modernized version of the historic 'land surrender' treaty process set forth in the *Royal Proclamation of 1763* (which was grounded in the assumption that Indigenous Peoples were potential - if not actual - land users [see chapter 3]), Australia's *Native Title Act* represents a formalized version of the Imperial laws and colonial policies in operation from the earliest years of settlement through to the recognition of native title at common law (which treated Indigenous Peoples as mere land inhabitants and/or land users). As a result, although the practical ability of Indigenous Peoples to successfully

assert and defend claims of continuing native title in the wake of native title's recognition at common law is arguably greater under the terms of Canada's comprehensive claims policy than it is under the terms of Australia's *Native Title Act*, neither Canada's comprehensive claims policy nor Australia's *Native Title Act* has significantly improved Indigenous Peoples practical ability to secure confirmation of judicially defensible native title in the wake of a native title's recognition at common law.

I – THE NEGOTIATED SETTLEMENT OF CONTINUING NATIVE TITLE CLAIMS: AN OVERVIEW OF CANADA'S COMPREHENSIVE CLAIMS PROCESS

Designed to achieve the full and final settlement of continuing native title claims outside of formal judicial channels, the comprehensive claims process embodied in Canada's comprehensive claims policy is a relatively straightforward process comprised of seven consecutive stages:

1. *Submission of a 'Statement of Claim'*: when an Indigenous group signals its intent to negotiate a full and final settlement of its continuing native title claim and provides documented evidence in support of the lawful merits of its continuing native title claim.
2. *Assessment and Acceptance/Rejection of the Claim for Negotiation*: when the Department of Indian Affairs and Northern Development (DIAND) evaluates the lawful merits of an Indigenous group's continuing native title claim and accordingly accepts or rejects the claim for negotiated settlement.
3. *Preparation for Negotiations*: when all relevant parties to the claim are identified and directed to undertake any pre-negotiation activities (research, consultations, land surveys, etc.) that might be required to proceed with productive comprehensive claims negotiations, and the relevant principles (i.e. the claimant group, the federal government and the relevant provincial/territorial government) designate their official negotiation teams.

4. *Initial Negotiations*: when the official negotiation teams negotiate a 'Framework Agreement' that establishes the scope, process, topics and parameters of the negotiations to follow¹.
5. *Substantive Negotiations*: when the official negotiation teams negotiate an 'Agreement in Principle' (AIP) on all settlement issues identified in the Framework Agreement (Stage 4) and seek formal approval of the negotiated AIP from the relevant indigenous group and government Minister(s).
6. *Finalization*: when the official negotiation teams formalize the terms of the AIP to produce a Final Settlement Agreement (including an implementation plan²) and seek formal approval of the negotiated Final Settlement Agreement from: the relevant government Ministers; the relevant indigenous group; and, the relevant federal and provincial/territorial legislatures. Upon receiving Royal Assent from the Governor General of Canada, the negotiated Final Settlement Agreement is accorded the force of law (by virtue of a federal and provincial/territorial acts of parliament) and constitutional recognition and affirmation (by virtue of s.35 of the *Constitution Act, 1982*³).
7. *Implementation*: when the terms of the Final Settlement Agreement are carried out by all parties in accordance with an embedded implementation plan.

As will now be explained, however, this relatively straightforward 'modern treaty' process does little to improve Indigenous Peoples' ability to assert, defend, and

¹ In order to facilitate more effective and equitable comprehensive claims negotiations, the federal government's 1986 policy statement on its comprehensive claims policy adopted a recommendation made by the 1986 Coolican Report that 'framework agreements' be used at the outset of negotiations to ensure that all parties share an adequate consensus about: (i) the major contents of a potential final settlement agreement; (ii) the approximate timetable for concluding a final settlement agreement; and, (iii) the processes that will govern both immediate comprehensive claims negotiations and eventual final settlement implementation.

² The inclusion of implementation plans in Final Settlement Agreements was introduced in 1986 when the federal government revised its comprehensive claims policy in response to the Coolican Report. At this time, a major problem with the comprehensive claims policy as it had been applied in *James Bay and Northern Quebec Agreement, 1975* and supplementary *Northeastern Quebec Agreement, 1978* was that it lacked any clear provisions for the implementation of Final Settlement Agreements. As a result, numerous 'complementary agreements' had been required to resolve disputes and facilitate the implementation of Canada's first two 'modern treaties'. This problem was directly addressed in the federal government 1986 policy statement on comprehensive claims which unambiguously stated: "Final agreements must be accompanied by implementation plans." [Canada, *Comprehensive Land Claims Policy* (Ottawa: Minister of Supply and Services, 1987), p. 25].

secure continuing native title in the post-common law recognition era. This is owing to the fact that the comprehensive claims process: (i) places a heavy burden of proof on those Indigenous people who chose to pursue a negotiated (rather than litigated) settlement of their continuing native title claims; (ii) affords the federal and provincial/territorial governments a tremendous degree of discretionary authority over both the content of comprehensive claims negotiations and the terms of negotiated Final Settlement Agreements; and, (iii) is directed towards securing Indigenous Peoples' voluntary surrender/exchange of judicially defensible native title and aboriginal rights. As a result, those Indigenous Peoples who chose to engage in negotiated settlements of their continuing native title claims are unlikely to achieve a greater degree of formal native title recognition and respect than did those Indigenous Peoples who participated in the historic 'land surrender' treaty process (which required Indigenous Peoples to formally 'surrender' their traditional territories in exchange for a negotiated package of rights, interests, benefits and entitlements – see chapter 2).

i) Stage 1 – Initiating the Negotiated Settlement of Continuing Native Title Claims

The process of negotiating an extra-judicial settlement of continuing native title claims in the Canadian case is initiated when an Indigenous claimant group presents a formal 'Statement of Claim' to the Comprehensive Claims Branch (CCB) of the Claims and Indian Government Sector (CIGS) of the federal Department of Indian Affairs and

³ Sec. 35 of the *Constitution Act, 1982* read as follows: "(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed ... (3) For greater certainty, in subsection (1) 'treaty rights' includes rights that now exist by way of land claims agreements or may be so acquired."

Northern Development (DIAND), (formerly the Office of Native Claims)⁴. According to the terms of the comprehensive claims policy, this statement must provide evidence in support of an Indigenous claimant group's 'lawful' (i.e. judicially defensible) claim of continuing native title as well as its preparedness to enter into 'productive' modern treaty negotiations.

To pass the first hurdle, Indigenous claimants groups are required to establish that the native title they claim can in fact be recognized as an existing *sui generis* real property right at common law. Inspired by the Federal Court's 1979 *Baker Lake* decision⁵, which established the first common law 'test' for continuing native title (see chapter 5), this aspect of the comprehensive claims policy requires Indigenous land claimants to include all of the following in their formal 'Statements of Claim':

- i) a description of the extent and location of traditional land use and occupancy, together with a map outlining the approximate boundaries of the lands under claim"⁶;
- ii) a precise identification of "the claimant group including the names of the bands, tribes or communities on whose behalf the claim is being made, the claimant's linguistic and cultural affiliation, and approximate population figures for the claimant group"⁷, and,
- iii) evidence demonstrating all of the following:

⁴ CIG's Comprehensive Claims Branch represents the Government of Canada in the negotiation of comprehensive land claims with Indigenous groups and the relevant province or territory. Its primary goal is to "negotiate modern treaties which will provide a clear, certain and long-lasting definition of rights to lands and resources for all Canadians; thus equitably reconciling the protection of Aboriginal and non-Aboriginal interests through negotiation processes by; (i) providing economic opportunities for Aboriginal groups, building new relationships with government, promoting partnerships between Aboriginal groups and their neighbours in managing lands and resources; and (ii) ensuring that comprehensive land claims respect the fundamental rights and freedoms of all Canadian, Aboriginal and non-Aboriginal; and (iii) ensuring that the interests of the general public and existing legal interests are respected under these agreements and if affected, are dealt with fairly." [Canada, Indian Affairs and Northern Development, "Comprehensive Claims Branch" (2001), retrieved from: http://www.ainc-inac.gc.ca/ps/clm/ccb_e.html (12/8/01)].

⁵ *Hamlet of Baker Lake v Minister of Indian Affairs and Northern Development* [1979] 3 CNLR 17.

⁶ Canada (1987), p. 23.

⁷ *Ibid.*

- a) “[that] the Aboriginal group is, and was, an organized society;
- b) [that] the organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations;
- c) [that] the occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies;
- d) [that] the Aboriginal group can demonstrate some continuing use and occupancy of the land for traditional purposes;
- e) [that] the group’s Aboriginal title and rights to resource use have not been dealt with by treaty; and,
- f) [that] Aboriginal title has not been eliminated by other lawful means.⁸

Indigenous people not only object to this aspect of the comprehensive claims policy on the grounds that it is Eurocentric in nature and out of keeping with the Supreme Court’s revised test for continuing native title at common law (notably absent the ‘organized society’ criteria) set out in the 1997 *Delgamuukw* decision⁹ (see chapter 5). They also object to this aspect of the policy on the grounds that it forces Indigenous land claimants to engage in an expensive and time-consuming *de facto* litigation of their continuing native title claims even as they consent to their negotiated settlement. As explained in “Inadequacies of the Federal Claims Process”:

The first flaw in the Federal Land Claims Policy is the very name itself – “Land Claims”. In fact the term “Land Claim” is itself both a misleading title and an insult to First Nations. If there is any doubt as to ownership, the benefit of the doubt must go to the original owners – the First Nations.

⁸ Canada, *Federal Policy for the Settlement of Native Claims*, (Ottawa: Minister of Public Works and Government Services Canada, 1993; rp. 1998), pp. 5-6.

⁹ *Delgamuukw v. British Columbia* [1997] 3 SCR 1010 (SCC).

Why should we have to claim our own lands? The burden of proof of legal title or interest in First Nations lands must rest with Canada.¹⁰

The assumption of the federal government, however, appears to be that because native title has been recognized as an existing common law real property right it would be irresponsible for the government to enter into comprehensive claims negotiations without first being secure in the knowledge that the Indigenous parties with whom it plans to negotiate can in fact be recognized as the potential (if not actual) lawful owners of the lands in question. As a result, Indigenous land claimant are required to put a significant amount of time and energy into preparing a formal 'Statement of Claim' for presentation to the CCB if they choose to negotiate (rather than litigate) the settlement of their continuing native title claims.

Providing evidence of lawful continuing native title, however, is not the only onerous hurdle that Indigenous land claimants must cross in order to initiate a negotiated settlement of their continuing native title claims. They must also provide evidence that they are ready and willing to participate in 'productive' comprehensive claims negotiations. This requires proof of substantive community support for a negotiated Final Settlement Agreement, a demonstrated institutional capacity to proceed with comprehensive claims negotiations, and the identification of reasonable final settlement goals.¹¹ Of course, satisfying these requirements can be an onerous task considering the

¹⁰ National Aboriginal Documents Database, Land Claims Issues, Claims Policies, "Inadequacies of the Federal Claims Policies", retrieved from: http://www.landclaimsdocs.com/pol_inadeq.htm (6/25/2002).

¹¹ For insight into this aspect of the comprehensive claims policy see: Canada, *Living Treaties: Lasting Agreements*, Report of the Task Force to Review Comprehensive Land Claims Policy (Ottawa: Minister of Supply and Services, 1985) (the 'Coolican Report').

significant population dispersals and resulting decline in internal community consensus that have been precipitated by over 200 year of colonial settlement.

Given that a major problem with the comprehensive claims policy has been the length of time it takes to conclude final settlement agreements¹², however, it is perhaps not surprising that the federal government requires evidence of some degree of preparedness to enter into comprehensive claims negotiations directed towards achieving “a clear, certain and long-lasting definition of rights to land and resources.”¹³ According to Indigenous Peoples, however, this aspect of the policy simply serves to reinforce that aspect of the historic ‘land surrender’ treaty process which gave colonial authorities the ultimate discretionary authority to determine with which Indigenous groups they were willing to enter into treaty negotiations and under what circumstances.

ii) Stage 2 - Assessment and Acceptance/Rejection of a Claim for Negotiation

Upon the receipt of an Indigenous group’s ‘Statement of Claim’ by the Comprehensive Claims Branch (CCB) of DIAND, the Legal Services Branch of DIAND is directed to review the *prima facie* claim of continuing native title (and its supporting materials) and to seek the advice of the Minister of Justice as to the claim’s lawful merits (i.e. its ability to be successfully defended at common law). A preliminary opinion on the acceptability of the claim for negotiation is then prepared by the CCB and submitted to the Indigenous group involved for review. If deemed necessary, the Indigenous group

¹² See for example: Canada, *1998 Report of the Auditor General of Canada*, Chapter 14 – Indian and Northern Affairs Canada: Comprehensive Land Claims (Ottawa: Minister of Supply and Services Canada, 1998), 14.58-14.65; Canada, *2001 Report of the Auditor General of Canada*, Chapter 12 – Follow-up Recommendations in Previous Reports (Ottawa: Minister of Supply and Services Canada, 2001), 12.118-12.148.

involved may then provided additional material evidence and/or legal arguments in support of its claim of continuing native title to the CCB before a final opinion on acceptability is prepared (by the CCB) and submitted to the federal Minister for Indian Affairs and Northern Development for final consideration.

Because the federal Minister is expected to either accept or reject a claim of continuing native title for negotiation within 12 months of its original submission, however, an Indigenous claimant group may choose to withdraw its 'Statements of Claim' if significant deficiencies are identified during this process and submit a new/revised 'Statement of Claim' to the CCB for fresh consideration at a later date.¹⁴

Although this stage of the comprehensive claims process has been designed to ensure that the federal government negotiates with *bone fide* native title claimants only, it places an enormous (and, many would argue, unreasonable) burden of proof on Indigenous land claimants. As a result, the assessment process embedded in the comprehensive claims policy has been the subject of substantial criticism by Indigenous people. As explained in "Inadequacies of the Federal Claims Policy":

[Assessment] has come to mean in practice that a First Nations' land rights assertion (claim) is valid only if, in the opinion of a Department of Justice lawyer, the Crown would lose the case in court. This standard is simply meant to minimize government liability and is not based on standards of natural justice ...

First Nations are expected to present the legal basis for a claim. However, there is no such reciprocal duty on the part of the Crown. The legal opinions that are provided [to the CCB] by the Department of Justice, which form the basis for the rejection of a claim, are not even shared with the First Nation once the claim is rejected. The validity of a claim is

¹³ Canada (1993; rp. 1998), p. 5.

¹⁴ Robert A. Reiter, *The Law of Canadian Indian Treaties* (Edmonton: Juris Analytica Publishing Ltd., 1996), Part IV, p. 4.

determined in secrecy. This is simply against the rules of natural justice and cannot be tolerated.

[Furthermore,] [o]nce a claim is recommended for acceptance as valid it is sent to the Minister of Indian Affairs for approval. This constitutes direct political interference. In a court of law politicians are fired when they try to influence judges. Why should that standard of non-interference be any less for First Nations?¹⁵

As a result, some Indigenous Peoples (notably those affiliated with the Union of British Columbia Indian Chiefs (UBCIC)) have refused to participate in the comprehensive claims process, arguing that it does not pay respect to either the common law concept of *sui generis* native title or Indigenous Peoples' status as the original (and continuing) owners/stewards of their traditional territories.¹⁶ Instead, like the historic treaty process that preceded it, the comprehensive claims process places the federal government in the unassailable position of determining which Indigenous Peoples' it will consent negotiate with and, (as was explained in chapter 6), under what circumstances.

iii) Stage 3 - Preparation for Negotiations

Following the acceptance of a 'Statement of Claim' by the federal Minister for Indian Affairs and Northern Development, all relevant parties to the claim at issue (including potential third parties) are identified by the CCB and informed of the impending comprehensive claims negotiations. During this 'Preparation for Negotiations' stage of the comprehensive claims process each formal party to the

¹⁵ National Aboriginal Document Database, *supra* note 10.

¹⁶ See, for example: UBCIC, "Aboriginal Rights and Title Position Paper", (Vancouver: Union of British Columbia Indian Chiefs, 1985); UBCIC, "Certainty: Canada's Struggle to Extinguish Aboriginal Title" (Vancouver: Union of British Columbia Indian Chiefs, 1998), available at: <http://www.ubcic.bc.ca/certainty.htm>; and, UBCIC, "Aboriginal Title Implementation", (Vancouver: Union of British Columbia Indian Chiefs, 1998), available at: <http://www.ubcic.bc.ca/implementation.htm>.

impending negotiations (i.e. the federal government, the relevant provincial/territorial government, and the relevant Indigenous claimant group – see chapter 6) designates an appropriate negotiation team, prepares a negotiation agenda, and conducts relevant research, consultations, surveys, etc. in support of its negotiation agenda.

During this stage of the comprehensive claims process, any special procedural arrangements that might be deemed necessary are identified and agreed upon by all formal parties involved (for example: how the Indigenous community involved will signal its acceptance of agreements concluded or consented to by its negotiation team; how the interests of any non-Indigenous residents of the land in question and/or other relevant third parties will be dealt with during the course of formal negotiations; and, how [or to what extent] the general public will be informed of and/or invited to comment on particular aspects of negotiation proceedings). It is also during this stage of the comprehensive claims process that Indigenous claimant groups can begin to receive discretionary federal funding in support of their native title claim activities (see chapter 6), although Indigenous representative organizations can also apply for discretionary federal funding during the pre-stage 1 period in order to conduct claims research etc.¹⁷

Although this stage of the comprehensive claims process appears to be relatively unproblematic, it is the overarching issue of ‘fairness and equity’ that has elicited critical objections from Indigenous people:

¹⁷ In 2002-2003, DIAND expended a total of \$442.0 million in grants in its ‘Claims’ business line (which includes both comprehensive and specific claims). Of this amount, a total of \$58.5 million was provided in the form of loans to native title claimants, a total of \$396.7 was provided in the form of grants to Indigenous groups/organizations (to be directed towards claims research etc.), and a total of \$57.0 million was provided in other contributions to Indigenous groups/organizations (to be directed towards claims research etc.) [Canada, Treasury Board of Canada Secretariat, *Indian and Northern Affairs Canada and Canadian Circumpolar Commission Performance Report for the Period Ending March 31, 2003*, Section

[t]he [comprehensive claims] process is not based on standards of *fairness and equity*. The federal government acts as defendant, judge, and jury which puts it into a *conflict of interest* situation. The deputy minister of Indian Affairs who makes the funding decision also decides the validity and settlement value of any claim. This conflict is all the more evident because of the fiduciary role and responsibility that the Crown has to protect the interest of First Nations. It is simply against all the rules of natural justice that *one of the parties* to a dispute is allowed to control and decide the outcome of the process [emphasis original].¹⁸

As was evidenced in chapter 6, and as will be made more clear in the remainder of this chapter, the degree of discretionary federal government authority embedded in the comprehensive claims policy notably diminishes Indigenous claimant groups' capacity to both: (a) secure a meaningful political accommodation of continuing native title; and, (b) meaningfully exercise their judicially defensible native title rights and interests in the wake of a successfully negotiated Final Settlement Agreement.

iv) Stage 4 - Initial Negotiations: The Negotiation of a 'Framework Agreement'

When all principal parties to the continuing native title claim at issue indicate their readiness to begin formal negotiations (or when the CCB determines that all principle parties should reasonably be expected to be ready to begin formal negotiations) negotiations directed towards concluding a 'Framework Agreement' are set in motion. During this stage of the comprehensive claims process, the principals' negotiation teams attempt to come to an agreement on the full range of issues (see chapter 6) that will form the basis of substantive negotiations to follow, essentially establishing a preliminary 'table of contents' for the anticipated Final Settlement Agreement.

IV, Tables 1-6, retrieved from: http://www.tbs-sct.gc.ca/rma/dpr/02-03/INAC-AINC/INAC-AINC03D_e.asp (16/06/2004)].

¹⁸ National Aboriginal Document Database, *supra* note 10.

Because negotiated Framework Agreements are expected to provide a comprehensive enumeration of all issues amenable to substantive negotiations (i.e. negotiations directed towards achieving a mutually acceptable Agreement-in-Principle on the terms of a Final Settlement Agreement), they generally take several years to conclude and are invariably the subject of much inter-party politicking.

It is important to note, however, that according to the federal government, “the comprehensive claims process is intended to lead to agreement on the special rights Aboriginal peoples will have *in the future* with respect to lands and resources. It is not an attempt to define what rights they might have had *in the past*”¹⁹ (emphasis added). As a result, once a comprehensive claim has been accepted for negotiation by the federal Minister (i.e. the successful completion of stage 2), the principals are required to pay little, if any, formal attention to the judicially defensible nature and content of the continuing native title at issue. This means that they are free to come to a mutually acceptable agreement on the range of rights, interests, benefits, and obligations that will impart to the Indigenous claimant group (and to other relevant parties) upon the successful conclusion of a Final Settlement Agreement, rather than limit their negotiations to what the Indigenous claimant group involved may or may not be able to achieve through a litigated settlement of its continuing native title claim.

This having been said, however, it is important to note that an Indigenous group’s approved ‘Statement of Claim’ (and supporting materials) is always taken as the starting point for formal comprehensive claims negotiations. As a result, because an accepted ‘Statement of Claim’ presumably includes only those lands, waters, rights, benefits, and

¹⁹ Canada (1993; reprinted 1998), p. 5.

interests that can pass (federal) departmental and ministerial scrutiny, the range of issues included in any given Framework Agreement is unlikely to reflect the ‘true’ scope, nature and content of continuing native title as these are actually understood by the Indigenous group itself. Furthermore, because the ‘true’ scope, nature and content of continuing native title have likely been ‘watered-down’ in order to produce a formal claim of continuing native title (i.e. ‘Statement of Claim’) that is amenable to negotiation under the auspices of the comprehensive claims policy, and because the interests of the federal government, the relevant provincial/territorial government, and any relevant third parties are likely to be antithetical to at least some of the interests of the Indigenous claimant group involved, the negotiation of a Framework Agreement, followed by the negotiation of an Agreement-in-Principle and the negotiation of a Final Settlement Agreement, is likely to result in a progressive erosion of even those lands, waters, rights, benefits and interests that were included in the Indigenous group’s formal ‘Statement of Claim’ in the first place. As a result, the comprehensive claims policy significantly limits Indigenous Peoples’ practical ability to procure a substantial political accommodation of continuing native title in the wake of native title’s recognition at common law.

v) Stage 5 - Substantive Negotiations: The Negotiation of an ‘Agreement-in-Principle’

Once a Framework Agreement has been successfully negotiated by the principals and accepted by all parties (i.e. the relevant Indigenous claimant group and the relevant federal/provincial/territorial Minister(s) responsible for Aboriginal Affairs), ‘substantive negotiations’ on the range of issues identified the Framework Agreement commence in earnest. These substantive negotiations (conducted between the principals), are directed

towards securing all party agreement on an Agreement-in-Principle (AIP) that will clearly detail the nature, content, scope and character of all rights, benefits, interests, institutional arrangements and obligations that will presumably form part of eventual the Final Settlement Agreement. During these negotiations, however, the federal negotiation team (and, in accordance with any relevant provincial/territorial land claims policies, the relevant provincial/territorial negotiation team) bears the responsibility for ensuring that public and third parties interests in respect of the proposed 'settlement area' (and, where appropriate, in lands and/or waters adjacent to the proposed 'settlement area') are taken into account. As explained the federal government's 1987 policy statement on comprehensive claims:

In attempting to define the rights of aboriginal people, the Government of Canada does not intend to prejudice the existing rights of others. The general public interest and third party interests will be respected in the negotiation of claims settlements and, if affected, will be deal with equitably. Provision must be made for protecting the current interests of non-aboriginal subsistence users and for the right of the general public to enjoy recreational activities, hunting and fishing on Crown lands, subject to laws of general application ...

Settlements will provide for innocent public access to selected or retained aboriginal lands and for right-of-way for necessary public purposes. Access rights pertaining to transportation routes in and through the settlement area must also be provided for.

Holders of subsurface rights must have access to settlement lands, where necessary, for the exploration, development and production of resources. The exercise of such rights will be subject to fair compensation as determined through timely negotiations or by arbitration.²⁰

As a result, the negotiations teams of Indigenous claimant groups often have to make difficult settlement trade-offs in order to conclude AIPs that are acceptable to their federal and provincial/territorial counterparts.

Once concluded, the negotiated AIP is presented to the Indigenous claimant group involved as well as to the relevant government Ministers (i.e. the federal and provincial/territorial Ministers responsible for Aboriginal Affairs) for formal approval. If approval is not granted, substantive negotiation normally continue (although the relevant parties may also direct their negotiation teams to negotiate a new Framework Agreement – if all parties are amenable - or withdraw from comprehensive claims negotiations altogether). If approval is granted, however, the negotiations teams proceed to stage 6 – ‘finalization’ – with the goal of producing a Final Settlement Agreement that can elicit formal all-party consent.

According to Indigenous people, however:

[t]he Claims Policy is applied in an inconsistent and highly arbitrary manner depending far too much on the Senior Bureaucrat or Justice Advisor assigned to the claim. The policy and process is entirely controlled by federal bureaucrats who often lack the authority to conclude settlements and bind the Crown. These individuals can make or break a claim. In several cases federal negotiators have agreed to a settlement only to return weeks later and rescind their agreement. The Department of Justice wears too many hats, as lawyers, advisors, facilitators or negotiators, which create[s] barriers to the efficiency and fairness of the process.²¹

As a result, the negotiation teams of Indigenous land claimants are frequently required to revise their negotiation agendas in light of unforeseen pitfalls encountered during the AIP negotiation process. This mirrors the historic ‘land surrender’ treaty process in that Indigenous leaders/representatives were frequently required to revise their group’s/ People’s treaty goals in light of what colonial authorities were and were not willing to include in the terms of historic ‘land surrender’ treaties. It also mirrors the historic ‘land

²⁰ Canada (1987), pp. 21-22.

²¹ National Aboriginal Document Database, *supra* note 10.

surrender' treaty process in that the written terms of the historic 'land surrender' treaties arguably do not accurately reflect the actual agreements made during historic treaty negotiations but rather favour the pre-treaty negotiation terms designed and/or preferred by colonial authorities (see chapter 1).

vi) Stage 6 - Finalization: The Creation and Formal Ratification of a Final Settlement Agreement

Once all parties have formally consented to the AIP negotiated during stage 5 of the comprehensive claims process, the principals' negotiation teams seek to create a formal legal text of the negotiated settlement agreement. Known as a 'Final Settlement Agreement', 'Final Agreement' or 'modern treaty', this document is intended to clearly and unambiguously define all future rights, responsibilities, interests, institutional arrangements and obligations in respect of the lands in question (i.e. the 'settlement area'). As was explained in the federal government's 1986 comprehensive claims policy statement:

The federal government's approach in this important matter [i.e. the matter of settling continuing native title claims] has been to seek to clarify the land and resource rights of aboriginal claimants, governments, and the private sector, through negotiation of settlement agreements. Through such negotiations, a range of land and resource-related matters has been addressed, including land ownership, and the right to the use and management of wildlife and renewable resources. Other topics directly or indirectly linked to land and resources have also been dealt with in the context of these negotiations [i.e. aboriginal self-government]. Claims settlements have thus provided an opportunity for government and claimants to redefine the most fundamental aspects of their relationship by a process of negotiation.²²

²² Canada (1987), p. 6.

Because the most fundamental aspects of comprehensive claims negotiations are controlled by the federal government (and provincial/territorial governments), however, many Indigenous people submit that “the [comprehensive claim] Policy does not provide a forum for First Nations to negotiate on a government to government basis, as full and equal parties.”²³ As a result, it is argued, negotiated Final Settlement Agreements are inherently predisposed to reflect the interests of Canadian governments and non-Indigenous people rather than those of Indigenous claimant groups themselves. This is particularly evident in the policy’s requirement that Indigenous claimant groups either ‘cede, release and surrender’ all native title/aboriginal rights, interests and claims (whatever they may be) in the terms of their Final Settlement Agreements or agree that such rights, interests and claims will only be exercisable and judicially defensible insofar as they are not ‘inconsistent’ with the terms of their Final Settlement Agreements (see chapter 2).

As a result, some Indigenous people and Indigenous representative organizations argue that the litigated settlement of continuing native title claims (risky though it may be) potentially holds more meaningful promise than does the negotiated settlement of continuing native claims.²⁴ This has led to calls for a wholesale revision of the comprehensive claims policy and/or the creation of an independent ‘Comprehensive Claims Commission’ (comprised of equal numbers of Indigenous and non-Indigenous Commissioners) with the authority to assess claims of continuing native title and responsibility to oversee their equitable resolution. For those Indigenous claimant groups voluntarily involved in the existing comprehensive claims process, however, the greatest

²³ National Aboriginal Document Database, *supra* note 10.

practical concerns are arguably: (i) whether their negotiated Final Settlement Agreements provide enough of a reasonable basis for future growth, development and prosperity (measured in socio-cultural as well as political-economic terms) to merit extinguishing or exchanging continuing native title and aboriginal rights; and, (ii) whether the federal and provincial/territorial governments will formally ratify their negotiated Final Settlement Agreements.

To explain these last points further, once the text of a Final Settlement Agreement has been set out in a manner satisfactory to all negotiation teams and formally approved by the relevant federal and provincial/territorial Ministers, it must then be formally ratified by the Indigenous claimant group involved and the relevant federal and provincial/territorial governments. For the Indigenous claimant group involved, formal ratification is contingent upon the outcome of a previously agreed upon consent mechanism (this might be: a majority vote of community members; a pre-established greater-than-majority vote of community members; a plurality vote of community 'families'/'tribes'/'clans'; or, other means of gauging community consent/consensus established during the 'initial negotiations' phase of the comprehensive claims process). For the relevant federal and provincial/territorial government legislatures, however, formal ratification involves the enactment of final settlement legislation, which takes the form of ordinary government bills (one introduced in the provincial/territorial parliament and one introduced in the federal parliament) comprised of the negotiated Final Settlement Agreement itself.²⁵

²⁴ See, for example: UBCIC (1985); UBCIC (1998a); and, UBCIC (1998b).

²⁵ Although the historic treaties became effective upon their formal approval by the Indigenous group involved and the Crown representatives with whom they engaged in negotiations, modern practice

If approval, ratification and/or enactment into law are not successful, the principals may direct their negotiation teams to attempt to revise the original Final Settlement Agreement (if all parties are amenable), attempt to negotiate a new Framework Agreement (if all parties are amenable) or withdraw from comprehensive claims negotiations altogether. If approval, ratification and enactment into law are successful, however, the Final Settlement Agreement comes into effect upon receiving Royal Assent from the Governor General of Canada (and/or in accordance with the terms of the Final Settlement Agreement itself) and is afforded constitutional protection by virtue of sec. 35 of the *Constitution Act, 1982*²⁶.

vii) Stage 7 - Implementation

Having been formally approved by the Indigenous community involved and formally enacted into law via provincial/territorial and federal settlement legislation, the Final Settlement Agreement (or ‘modern treaty’) becomes a constitutionally protected agreement to which all parties must comply. All that is then left for the parties to do is carry out/respect the terms, conditions, provisions, etc. of the Final Settlement Agreement. This is facilitated by a formal ‘schedule of implementation’ (included within

(initiated with the conclusion of the *James Bay and Northern Quebec Agreement, 1975* discussed in chapter 3) requires that Final Settlement Agreements or ‘modern treaties’ be formally approved by all relevant government legislatures. As a result, once the relevant Indigenous claimant group involved has formally ratified its negotiated Final Settlement Agreement, the relevant government Ministers involved must then present the negotiated Final Settlement Agreement, in the form of a government Bill, to their respective parliaments where it is the subject of normal legislative approval processes.

²⁶ The relevant subsections of sec. 35 of the *Constitution Act, 1982* read as follows: “(1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed ... (3) for greater certainty, in subsection (1) ‘treaty rights’ includes rights that now exist by way of land claims agreements or may be so acquired.”

the terms of the Final Settlement Agreement itself) and through a clear and unambiguous definition of all terminology used in the body of the Agreement.

Given the range of issues that are potentially amenable to negotiation under the auspices of the federal government's comprehensive claims policy (see chapter 6), the diverse (and often conflicting) interests of Indigenous Peoples, Canadian governments, and relevant third parties, and the fact that Final Settlement Agreements are intended to represent 'full and final' settlements of continuing native title claims, however, the negotiation and successful conclusion of comprehensive land claims typically takes many (i.e. 10-20) years.

As will now be demonstrated, however, although the native title determination process set out in Australia's *Native Title Act* generally involves much shorter time-frames, it also affords Indigenous Peoples a much lesser degree of control over the final outcomes of their continuing native title claims than does Canada's significantly government-controlled comprehensive claims process.

II – RECOGNIZING AND PROTECTION CONTINUING NATIVE TITLE: AN OVERVIEW OF AUSTRALIA'S NATIVE TITLE DETERMINATION PROCESS

As has already been explained, Canada's comprehensive claims process is intended to result in the extra-judicial settlement of continuing native title claims via a modern treaty process that has been designed to "resolve the legal ambiguity associated with the common law concept of Aboriginal rights."²⁷ The native title determination process set forth in Australia's *Native Title Act*, by contrast, is intended to result in Court sanctioned determinations of the precise nature, content and incidents of *judicially*

defensible continuing native title/native title rights and interests²⁸ so as to facilitate a ‘certainty’ of title throughout Australia. This process originally involved the submission of a ‘native title determination application’ to the National Native Title Tribunal (a statutory body created by the Act), which would then make a ‘determination of native title’ and register this determination with the Federal Court in order to give it the full force of law. This original process, however, was brought by the High Court of Australia’s ruling in *Brandy v Human Rights and Equal Opportunity Commission* (1995)²⁹ that an analogous process used by the Human Rights and Equal Opportunity Commission was unconstitutional.³⁰ As a result, when the *Native Title Act* was amended in 1998 a new native title determination process was introduced.

According to this new process, all ‘native title determination applications’ (see below) must now be submitted to the Federal Court, which is responsible for: (i) assessing the merits of all ‘native title determination applications’ (i.e. ‘claimant applications’, ‘non-claimant applications’, and ‘revised native title determination applications’); (ii) determining the manner in which all ‘native title determination applications’ will be processed (i.e. through ‘consideration’ of the native title determination order sought by the claimant – if the application is unopposed – or through ‘negotiation’, ‘mediation’, or ‘litigation/court imposed determination’ – if the application is opposed); and, (iii) ruling on the final outcome of all native title determination processes (i.e. by making an order for the approval, amendment(s) or rejection of

²⁷ Canada (1993; reprinted 1998), p. i.

²⁸ The terms ‘native title’ and ‘native title rights and interest’ are used interchangeably throughout the *Native Title Act* (NTA) and are synonymously defined in s. 223 of the Act.

²⁹ *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

claimant-proposed native title determinations, ‘negotiated’ native title determinations, and ‘mediated’ native title determinations, or by making a native title determination order itself).

As will now be explained, this quasi-judicial native title determination process is filled with pitfalls for traditional Indigenous land owners. This is owing to the fact that the native title determination process set forth in the *Native Title Act*: (i) sets out a statutorily codified interpretation of the judicial characterization of (and proof criteria for) native title at common law; (ii) permits four distinct types of native title determination applications - ‘claimant applications’, ‘non-claimant applications’, ‘revised native title determination applications’ and ‘compensation applications’ - to be filed under its auspices; and, (iii) is overlapped by a complicated ‘future act’ regime.

In order to provide some reasonable basis for comparison with Canada’s comprehensive claims policy, the remainder of this chapter will focus attention on the making and processing of ‘native title determination applications’ and, more specifically, on the making and processing of ‘claimant applications’ for a determination of native title (see subsection (i) below). Other aspects of the *Native Title Act*, however, will be referenced where appropriate in order to provide a meaningful overview of Australia’s complicated political accommodation of continuing native title.

³⁰ The effect of the 1995 *Brandy* decision on the constitutional validity of the *Native Title Act, 1993* was

i) Phase 1 - Permitted Applications and Their Procedures

There are four types of native title determination applications permitted by the *Native Title Act* – ‘claimant applications’ for a determination of native title, ‘non-claimant applications’ for a determination of native title, ‘revised native title determination applications’, and ‘compensation applications’. Each of these applications will now be discussed in turn in order to facilitate a clearer understanding of the *Native Title Act’s* registration, notification, and determination procedures, which are discussed later in this chapter.

a) ‘Claimant Applications’

‘Claimant applications’ for a determination of native title refer to those formal claims of continuing native title/continuing native title rights and interests made under the auspices of the *Native Title Act* by an authorized member(s) or representative(s) of an Indigenous claimant group³¹. According to s. 62(2) of the *Native Title Act*, which draws heavily upon the judicial characterization of native title at common law (see chapters 3, 4 and 5), claimant applications for a determination of native title must include all of the following in order to be accepted by the Federal Court for formal considered:

confirmed in *Foumle v Selpan Pty Ltd* (1998) FC 1 (FFC).

³¹ NTA s. 61(1). “The person(s) authorised is the ‘applicant’ (s. 61(2)), who has particular functions and responsibilities (s. 62A)” [Australian Government Solicitor, Office of General Counsel, Native Title Unit, “Commentary on the Native Title Act 1993” in *Native Title: Native Title Act 1993 and Regulations with commentary by the Australian Government Solicitor*, Commonwealth of Australia (2nd ed; Canberra: Office of Legal Information & Publishing, Australian Government Solicitor, 1998), p. 49].

- (a) information, whether by physical description or otherwise, that enables the boundaries of:
 - (i) the area covered by the application; and
 - (ii) any areas within those boundaries that are not covered by the application;
 - to be identified;
- (b) a map showing the boundaries of the area mentioned in subparagraph (a)(i);
- (c) details and the result of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application;
- (d) a description of the native title rights and interests claimed in relation to particular land or waters (including any activities in exercise of those rights and interests), but not merely consisting of a statement to the effect that the native title rights and interests are native title rights and interests that may exist, or that have not been extinguished, at law;
- (e) a general description of the factual basis on which it is asserted that the native title rights and interests claimed exist and in particular that:
 - (i) the native title group have, and the predecessors of those persons had, an association with the area; and
 - (ii) there exist traditional laws and customs that give rise to the claimed native title; and
 - (iii) the native title claim group have continued to hold the native title in accordance with those traditional laws and customs;
- (f) if the native title claim group currently carry on any activities in relation to the land or waters – details of those activities;
- (g) details of any other applications to the High Court, Federal Court or a recognized State/Territory body, of which the applicant is aware, that have been made in relation to the whole or a part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title;
- (h) details of any notices under section 29 (or under a corresponding provision of a law of a State or Territory), of which the applicant is aware, that have been given and that relation to the whole or part of the area [this section requires notification to be given to specific parties before a lawful ‘future act’ can be done].³²

³² NTA s. 62(2).

Furthermore, in order to ensure that claimant applications are not fictitious and/or unauthoritatively presented, the *Native Title Act* requires all claimant applications for a determination of native title to include an affidavit, sworn by the applicant, stating:

- (i) that the applicant believes that the native title rights and interest claimed by the native title claimant group have not been extinguished in relation to any part of the area covered by the application; and
- (ii) that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register [which contains all previously determined incidents of continuing native title/native title rights and interest]; and
- (iii) that the applicant believes that all of the statements made in the application are true; and
- (iv) that the applicant is authorized by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and
- (v) stating the basis on which the applicant is authorised as mentioned in subparagraph (iv).³³

These requirements are intended to facilitate the identification of lawful (i.e. judicially defensible) claims of continuing native title/continuing native title rights and interests as well as to ensure that their presentation for formal determination is made by an appropriate individual(s). Like Indigenous claimant groups in the Canadian case, then, Indigenous claimant groups in the Australia case are required to invest a considerably amount of time, effort and financial/social-capital resources in preparing their claims of continuing native title for formal presentation and assessment outside of ‘ordinary’ judicial processes. (See Appendix 3 – Claimant Application Form).

³³ NTA s. 62(1)(a)(i-iv).

b) *'Non-Claimant Applications'*

The *Native Title Act* also, however, allows claims for a determination of native title to be made by 'non-claimants' (i.e. persons who holds non-native title interests in respect of a particular area; a Commonwealth Minister, in respect of any area; or, a State/Territory Minister, in respect of any area within the limits of his/her State/Territory).³⁴ Such applications must include:

1. information identifying the boundaries of:
 - a) the area covered by the application; and
 - b) any areas within those boundaries that are not covered by the application;
2. a map showing the boundaries of the area covered by the application;
3. details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application;
4. details of any interest held by the applicant in the area covered by the application and any document (including a document of title) or other material that is evidence of that interest;
5. a draft order to be sought if the application is unopposed; and,
6. any other relevant information that the applicant wants to provide.³⁵

This type of application for a determination of native title is designed to permit the Federal Court to formally determine whether or not continuing native title/continuing native title rights and interests exist in respect of an area where no 'claimant application' for a determination of native title has (yet) been filed with the Federal Court and/or where no native title determination order has (yet) been made by the Federal Court. As a result, Indigenous Peoples may be forced to assert and defend continuing native title and/or continuing native title rights and interests (and incur the considerable cost associated with

³⁴ NTA s. 61(1).

³⁵ "Form 2: Native Title Determination Application – Non-Claimant Application", *Native Title (Federal Court) Regulations 1998*, Statutory Rules 1998, No. 272.

doing so) as a result of a ‘non-claimant’ application being filed in respect of their traditional territories.

c) *‘Revised Native Title Determination Applications’*

Standing apart from ‘claimant applications’ and ‘non-claimant applications’ for a determination of native title are ‘revised native title determination applications’. This type of application can be made to the Federal Court by a registered native title body corporate (an incorporated body which officially holds native title and manages approved native title rights and interests on behalf of successful native title claimants³⁶), a Commonwealth Minister, a State/Territory Minister, or the Native Title Registrar (see below)³⁷ if: (i) events that have taken place mean that the previous native title determination order made by the Federal Court (or the High Court) is not longer correct; or, (ii) the interests of justice otherwise require a revised native title determination order³⁸.

As a result, if confirmed native title holders lose their connection to their traditional territories (either physically or through the abandoning of traditional laws and customs) or if amendments to the *Native Title Act* redefine the nature of statutory native

³⁶ “The NTA establishes a framework for the holding and management of native title. It requires the use of corporations that stand in a relationship of ‘trust’ or ‘agency’ to the members of the native title group. The trust or agency relationship is statutory in character. Delegated legislation made under the NTA specifies the characteristics and functions of native title corporations and lays down procedures to be followed by the corporation in decisions relating to native title matters. The corporate trustee and agency device allows non-native title interests dealing with the group to channel their transactions through a single legal person with perpetual succession. This is intended to avoid the problem of fixing obligations on the ever-fluctuating membership of a group of natural persons lacking legal personality.” [Cristos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press, 2000), p. 114].

³⁷ NTA s. 61(1).

³⁸ NTA s. 13(5).

title recognition and/or protection, a new native title determination order on the nature, content and incidents of continuing native title/native title rights and interests may be requested of the Federal Court. In sum, native title determinations orders made under the auspices of the *Native Title Act* do not represent a full and final resolution of continuing native title claims.

This aspect of the *Native Title Act* reflects the judicial characterization of native title as a relatively weak (i.e. personal rather than proprietary) common law right to land and, in turn, reinforces the initial and historically contingent recognition of Indigenous Peoples are mere land inhabitants and/or land users. In sum, even confirmed incidences of continuing native title/continuing native title rights and interests are considered to be ‘inherently fragile’ and capable of progressive erosion over time owing to their judicial characterization as a ‘bundle of rights’.

d) ‘Compensation Applications’

The *Native Title Act* does, however, permit ‘registered native title holders’ (see below) to submit ‘compensation applications’³⁹ to the Federal Court in the event that native title is (or has been) lawfully extinguished (i.e. by surrender, by compulsory acquisition or by non-compulsory acquisition) or unlawfully infringed (i.e. when an act affects native title in such way that were it to be performed on freehold title it would attract the right to compensation).⁴⁰ In sum, according to the terms of the *Native Title Act*, registered native title holders may be entitled to compensation for the effect of the following on their continuing native title/continuing native title rights and interests:

³⁹ NTA s. 61(1).

- the validation of ‘past acts’⁴¹;
- the validation of ‘intermediate period acts’⁴²;
- the confirmation of: ‘previous exclusive possession acts’, ‘scheduled interests’, ‘Crown to Crown grants’, and ‘previous non-exclusive possession acts’⁴³; and,
- some ‘future acts’⁴⁴.

In order to apply for compensation under the auspices of the *Native Title Act*, however, registered native title holders (or their representative(s)) must first swear an affidavit confirming:

- i) that the applicant believes that native title rights and interests exist or have existed in relation to the area; and
- ii) that the applicant believes that all of the statements made in the application are true; and
- iii) that the applicant is authorised by all the persons in the compensation claim group to make the application and to deal with matters arising in relation to it; and
- iv) stating the basis on which the applicant is authorised as mentioned in subparagraph (iii); and
- v) [the sworn affidavit] must contain the details that would be required to be specified by [section 62] paragraph 1(b) [i.e. a map showing the boundaries of the area covered by the application and any areas within those boundaries that are not covered by the application] and may contain the details that would be permitted under [section 62] paragraph (1)(c) [i.e. details and the result of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application] if the compensation application were instead a native title determination application in respect of the native title involved in the compensation application.⁴⁵

⁴⁰ NTA s. 48-54 and 62(3).

⁴¹ NTA s. 17, 20, 51, 51(3) and the definition of the ‘similar compensable interest test’ in s. 240.

⁴² NTA s. 22D, 22G, 22L.

⁴³ NTA s. 23J.

⁴⁴ “[S]ome ‘future act’ provisions provide a general right of compensation (NTA s. 24FA(1)(b), 24GB(7), 24GE(4), 24HA(5), 24ID(1)(d), 24 JB(4), 24MD(2A)(f) and 24NA(6)); some provide a right where ordinary title holders get compensation or the act could not be done over ordinary title land (s. 24EB(7), 24EBA(5) 24FA(1)(c) and 24 KA(5)); and some provide a right if the relevant State or Territory law does not provide a sufficient compensation right (s. 24MD(2)(e), 24MD(3), and 24NA(5)(b)).” [Australian Government Solicitor (1998), p. 36].

⁴⁵ NTA s. 62(3).

As the Australian Government Solicitor explains in its ‘Commentary on the Native Title Act, 1993’, however, how compensation claimable under the auspices of the *Native Title Act* is to be calculated in any given situation is not easily discerned:

... s. 51(1) [of the *Native Title Act*] provides that native title holders are entitled to just terms so as to compensate them for any loss, diminution, impairment or other effect on their native title rights and interests. Where the compensation is for compulsory acquisition, regard can be had to any principles or criteria set out in relevant legislation (s. 51(2)). In other situations where ordinary title holders have compensation rights, the principles and criteria set out in the relevant legislation must be applied (s. 51(3)). Requests for non-monetary compensation can be made, and must be considered (s. 51(6), (7) and (8)). Subject to the requirement to pay just terms compensation, compensation for the extinguishment of native title must not exceed the amount that would be payable for the compulsory acquisition of a freehold estate (subsection 51A(1)). Section 53 provides that where any act or any provision of the Act would amount to an acquisition of property from a person for the purposes of s. 51(xxxi) of the Constitution on other than just terms, the person is entitled to just terms compensation.⁴⁶

As a result, what any native title holder might expect from a compensation determination is not easily predicted and is ultimately dependent upon the Federal Court’s interpretation of: (i) the terms of the *Native Title Act*; (ii) the terms of other lawful compensation regimes; (iii) the information provided in the relevant ‘compensation application’; and, (iv) any other information the Federal Court might consider relevant.

To explain this last point further, it is important to note that the rules for processing and making determinations in respect of ‘claimant’, ‘non-claimant’, ‘revised’ and ‘compensation’ native title determination applications are set out in Part 4 of the *Native Title Act*. According to these rules:

- the Federal Court has jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction

⁴⁶ Australian Government Solicitor (1998), pp. 36-37.

is exclusive of the jurisdiction of all other courts except the High Court⁴⁷;

- the Federal Court is bound by the rules of evidence, except to the extent that the Court otherwise determines⁴⁸;
- in conducting its proceedings, the Court may take account of the cultural and customary concerns of Aboriginal peoples and Torres Strait Islanders, but not so as to prejudice unduly any other party to the proceedings⁴⁹;
- the Commonwealth Minister may, at any time, on behalf of the Commonwealth, by giving written notice to the Federal Court, intervene in a proceeding before the Court in a matter arising under [the *Native Title Act*]⁵⁰; and,
- unless the Federal Court orders otherwise, each party to a proceeding must bear his or her own costs⁵¹.

How this statutory regime for formal native title determination/compensation orders may be affected by, interact with and/or itself affect ‘ordinary’ judicial processes and their findings, however, remains to be seen. As a result, the outcome of native title determination and compensation applications is very difficult to predict.

e) Commentary

As has already been demonstrated, the *Native Title Act* is a complicated and confusing piece of legislation. In fact, John Prescott (Chief Executive of BHP) has justly described reading the Act as something akin to ‘reading porridge’.⁵² In its current form (i.e. as amended by the *Native Title Amendment Act, 1998*), the *Native Title Act* now runs a remarkable 443 pages (not including Rules and Regulations) and is comprised of 15 Parts, 41 Divisions, 32 Subdivisions, 253 Sections, 191 Subsections and a Schedule

⁴⁷ NTA s. 81.

⁴⁸ NTA s. 82(1).

⁴⁹ NTA s. 82(2).

⁵⁰ NTA s. 84A(1).

⁵¹ NTA s. 85A(1).

comprised of 7 Parts and 46 Section. Given the tremendous complexity of the *Native Title Act*, the remainder of the chapter will focus attention on the Act's procedures, processes, and protocols as they relate to 'claimant applications'.

Although this focus does not, admittedly, capture all of the intricacies of Australia's statutory 'native title determination regime', it does provides meaningful insight into the degree of political accommodation afforded in native title in Australia's post-common law recognition era and thus serves as a reasonable basis for evaluating the competing (i.e. 'reactive' and 'self-reinforcing') path dependence hypotheses set forth in the Introduction to this study.

ii) Phase 2a - The 'Registration' of Continuing Native Title Claims

Upon receiving a 'claimant application' for the determination of continuing native title, the Registrar of the Federal Court must, as soon as is reasonably practicable, provide a copy of the claimant application (and its accompanying documentation) to the Native Title Registrar⁵³ (a statutory authority created by the *Native Title Act* for the purpose of maintaining a national 'Register of Native Title Claims'⁵⁴). After considering:

- (a) all information contained in the claimant application and in any other documents provided by the applicant;
- (b) any information obtained by the Registrar as a result of any searches conducted by the Registrar of registers of interests in relation to land or waters maintained by the Commonwealth, a State or a Territory;
- (c) any information supplied by the Commonwealth, a State or a Territory, that, in the Registrar's opinion, is relevant to the merits of the claim at issue; and,

⁵² Geoffrey Ewing, "The Australian Mining Industry Perspective, *Native Title and Trans Tasman Experience Conference*, Sydney (1998), p. 3.

⁵³ NTA s. 63.

⁵⁴ See NTA s. 184-191.

- (d) any information about current or previous non-native title rights and interests in, or in relation to, the land or waters in the area covered by the application⁵⁵,

the Native Title Registrar must determine whether or not the claim of continuing native title merits 'registration' on the national 'Register of Native Title Claims'.

In accordance with the new (i.e. post-*Native Title Amendment Act*) registration test set out in s. 190B of the *Native Title Act*, the Native Title Registrar must only register a claim of continuing native title if s/he is satisfied that:

- (i) the information and map contained in the application are sufficient for it to be said with reasonable certainty whether native title rights and interests are claimed in relation to particular land or waters;
- (ii) the persons in the native title application are named in the application; or the persons in that group are described sufficiently clearly so that it can be ascertained whether any particular person is in that group;
- (iii) the description contained in the application is sufficient to allow the native title rights and interests claimed to be readily identified;
- (iv) the factual basis on which it is asserted that the native title rights and interests claimed exist is sufficient to support the assertion. In particular, the factual basis must support the following assertions:
 - (a) that the native title claim group has, and the predecessors of those persons had, an association with the area;
 - (b) that there exist traditional laws acknowledged by, and traditional customs observed by, the native title claim group that give rise to the claim to native title rights and interests; and
 - (c) that the native title claim group continues to hold the native title in accordance with those traditional laws and customs;
- (v) at least some of the native title rights and interests claimed in the application can be, *prima facie*, established;
- (vi) at least one member of the native title group:
 - (a) currently has or previously had a traditional physical connection with any part of the land or waters covered by the application; or
 - (b) previously had and would reasonably have been expected currently to have a traditional physical connection with any part of the land or waters but for things done (other than the creation of an interest in relation to land or waters) by:

⁵⁵ NTA s. 190A(3) and (4).

- (i) the Crown in any capacity; or
- (ii) a statutory authority of the Crown in any capacity; or
- (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of lease;
- (vii) the application and accompanying documents do not disclose, and the Registrar is not otherwise aware, that because of section 61A (which forbids the making of applications where there have been previous native title determinations or exclusive or non-exclusive possession acts), the application should not have been made; and,
- (viii) the application and accompanying documents do not disclose and the Registrar is not otherwise aware, that:
 - (a) to the extent that the native title rights and interests claimed consist of or include ownership of minerals, petroleum or gas – the Crown in right of the Commonwealth, a State or a Territory wholly owns the minerals, petroleum, or gas; or
 - (b) to the extent that the native title rights and interests claimed relate to waters in an offshore place – those rights and interests purport to exclude all other rights and interests in relation to the whole or part of the offshore place; or
 - (c) in any other circumstance – the native title rights and interests claimed have otherwise been extinguished (except to the extent that the extinguishment is required to be disregarded under subsection 47(2) [which refers to pastoral leases held by native title claimants], 47A(2) [which refers to reserves etc. covered by claimant applications] or 47B(2) [which refers to vacant Crown land]).⁵⁶

In sum, the Native Title Registrar must consider, *prima facie*, that at least some of the native title rights and interests claimed in a claimant application for a determination of native title can be established at common law before s/he consents to their formal registration.⁵⁷

According to the ‘old’/original registration test, however, native title claimants were simply required “to state the belief that native title had not been extinguished. The

⁵⁶ See: NTA s.190B.

⁵⁷ See: NTA s. 190B(6).

Registrar then had no option but to accept the claim for registration.”⁵⁸ As a result, the amended *Native Title Act* has significantly increased the burden of proof required of native title claimants during the ‘registration’ phase of the native title determination process. As McIntyre, Ritter and Scheiner explain:

The logistical implications for native title claimant groups and representative bodies involved in the registration test are enormous. This is demonstrated dramatically in a recent submission by the Kimberly Land Council^{59]} which states that the KLC:

... is required under the *Native Title Act* to re-register, within the next six months, twenty-seven country native title claims and fifty-five polyg claims ... Sixteen specific tasks must be completed in order to gather and collect the information required about the native title claimants and produce requisite forms and documents ... the completion of the sixteen-step process for each claim will require the following number of work days for various staff and consultants in the KLC: 288 consultant days; 597 legal officer days; 377 project development office days; and 236 field officer days.⁶⁰

Although the Kimberly Land Council’s statement refers to the re-registration of native title claims that were entered onto the national Register of Native Title Claims prior to the coming into force of the *Native Title Amendment Act* (30 September 1998) and were statutorily required to be re-registered thereafter, similarly onerous work-loads are also born by post-*Native Title Amendment Act* claimants. As a result, passing the ‘registration test’ is the first significant obstacle that native title claimants must overcome in order to achieve native title ‘recognition and protection’ under the auspices of the *Native Title Act*.

⁵⁸ Greg McIntyre, David Ritter and Paul Sheiner, “Administrative Avalanche: The Application of the Registration Test under the *Native Title Act 1993 (Cth)*”, *Indigenous Law Bulletin* 4:20 (April/May 1999), p. 10.

⁵⁹ Kimberly Land Council, *Submission to the Joint Parliamentary Committee on Native Title and the Land Fund*, (Broome; 13 April 1999).

⁶⁰ McIntyre, Ritter and Sheiner, (1999), p. 10.

As will now be explained, this ‘registration’ test mirrors the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users insofar as it presumes that non-indigenous land users must only take indigenous rights to land into consideration if such rights can be demonstrated to be judicially defensible.

iii) Phase 2b: Securing the ‘Right to Negotiate’

If the Native Title Registrar is satisfied that a claimant application for a determination of continuing native title meets all of the conditions outlined above, the claim of continuing native title in question is formally ‘registered’ on the national Register of Native Title Claims⁶¹. This used to provide those persons identified in the claimant application with a statutory ‘right to negotiate’ in respect of most future land dealings that might affect the area and/or rights and interests under claim.⁶² As was explained in chapter 2, however, this ‘right to negotiate’ was significantly watered down by the *Native Title Amendment Act, 1998* and now only provides registered native title claimants with a right to be ‘consulted’ about future land uses that might affect the areas under claim.⁶³ Though woefully inadequate, this right to negotiate *cum* right to be consulted is better than nothing, and thus most Indigenous claimant group consider the

⁶¹ See *NTA* s. 184-191. Note, however, that if a “claim is accepted for registration, the Registrar must, under [section] 186(1)(g), enter on the Register of Native Title Claims, details of only those claimed native title rights and interests that can, prima facie, be established. Only those rights and interests are taken into account for the purposes of subsection 31(2) (which deals with negotiation in good faith in a ‘right to negotiate’ process) and subsection 39(1) (which deals with criteria for making arbitral body determinations in a ‘right to negotiate’ process)” [Commonwealth of Australia, *Native Title: Native Title Act 1993 and Regulations with Commentary by the Australian Government Solicitor* (2nd ed; Canberra: Office of Legal Information & Publishing, Australian Government Solicitor, 1998), in-text note, p. 241].

⁶² This right does not, however, apply to either mining grants or compulsory acquisitions.

⁶³ See *NTA* Div. 3, SubDiv. P (i.e. *NTA* s. 25-44).

time and effort required to prepare a claimant application that can pass the *Native Title Act's* stringent registration test to be time and effort well spent.

It should be noted, however, that the *Native Title Act's* 'right to negotiate' provisions do not apply to all 'future acts'. Notably excluded are:

- the compulsory acquisition of native title rights and interests by the Commonwealth, a State or a Territory for: (i) its own benefit; (ii) the purpose of providing an infrastructure facility; or (ii) any other purpose or act approved by the Commonwealth Minister⁶⁴;
- any and all acts permitted by registered Indigenous Land Use Agreements⁶⁵;
- any and all mining exploration acts (and related acts) approved by the Commonwealth Minister⁶⁶;
- any and all gold or tin mining acts approved by the Commonwealth Minister⁶⁷;
- any and all opal or gem mining acts⁶⁸;

⁶⁴ NTA s. 26(1)(c)(iii).

⁶⁵ NTA s. 26(2)(a) referencing s. 24EB. "The NTA provides for a range of alternative procedures to settle native title claims, including provisions for agreements rather than litigation and mediation through the NNTT. Under the original legislation of 1993 these were known as Regional Agreements and provided for claimants, non-claimants and governments to solve native title issues and register these agreements with the NNTT. Under the 1998 amendments these agreements are known as Indigenous Land Use Agreements (ILUAs)." [D.P. Pollack, "Indigenous land in Australia: A quantitative assessment of Indigenous land holdings in 2000", CAEPR Discussion Paper No. 221 (Canberra: Centre for Aboriginal Economic Policy Research, 2001)]. According to Mantziaris and Martin (2000), "[i]t is too early to assess the practical benefits and disadvantages of the ILUA system. On the one hand, anecdotal evidence suggests that ILUAs may provide the means by which non-native title parties can (i) divert native title parties away from the native title registration process and the procedural rights that accrue under it, and (ii) secure the determination area from chaotic and protracted native title claim activity. In other quarters, ILUAs are viewed as a pathway towards achieving tangible benefits and outcomes for indigenous groups which avoid the need for costly and protracted native title mediation or litigation. It is thought that native title group may gain more benefits under an ILUA negotiated on the basis of statutory rights created by the registration of a native title claims than from the eventual recognition of native title itself." [Christos Mantziaris and David Martin, *Native Title Corporations: A Legal and Anthropological Analysis* (Leichhardt: The Federation Press, 2000), pp. 249-250]. For a more detailed discussion of ILUAs see: Pollack (2001); Mantziaris and Martin (2000); AIATSIS, Native Title Research Unit, "Research Update: Towards Comprehensive Agreement", *Native Title News* 5 (Sept/Oct 2003); Mary Edmunds and Diane Smith, *Members' Guide to Mediation and Agreement-Making Under the Native Title Act* (Perth: National Native Title Tribunal, 2000); Graeme Neate, "Indigenous Land Use Agreements: An Overview", *Indigenous Law Bulletin* 4:21 (June 1999), pp. 11-13; and, Diane Smith, "Finding a Way to Just and Durable Agreements", *Indigenous Law Bulletin* 4:21 (June 1999), pp. 4-6.

⁶⁶ NTA s. 26(2)(b) referencing s. 26A.

⁶⁷ NTA s. 26(2)(c) referencing s. 26B.

⁶⁸ NTA s. 26(2)(d) referencing s. 26C.

- any and all acts related to the renewal of a valid mining lease (and associated acts)⁶⁹;
- the compulsory acquisition of native title rights and interests related solely to land or waters wholly within a town or city⁷⁰; and,
- any and all acts related to a sea or intertidal zone⁷¹.

These exclusions, which were introduced by the *Native Title Amendment Act, 1998*, are greatly lamented by Indigenous Peoples and have been harshly criticized by the United Nations' Committee on the Elimination of all forms of Racial Discrimination (CERD). As was explained in chapter 2, this is a result of the fact that an effectively wholesale 'right to negotiate' was included in the original *Native Title Act, 1993* in order to provide Indigenous Peoples with some recompense for consenting to the Commonwealth government's desire to retroactively validate all past actions taken without regard for continuing native title. This having been said, however, the registration of presumably meritorious native title claims does provide native title claimants with some assurance against the arbitrary extinguishment and/or infringement of their native title rights and interests during the pre-native title determination period.

If the Registrar determines that a claimant application for the determination of native title does not satisfy all or some aspects of the conditions outlined above, s/he must, as soon as is practicable, "give the applicant and the Federal Court written notice of his or her decision not to accept the claim, including a statement of the reasons for the decision."⁷² If, however, "the only reason why the Registrar cannot accept the claim for registration is that the condition in subsection 190B(7) (which is about a physical

⁶⁹ NTA s. 26(2)(e) referencing s. 26D.

⁷⁰ NTA s. 26(2)(f) referencing s. 251C.

⁷¹ NTA s. 26(3).

⁷² NTA s. 190D(1).

connection with the claim area) is not satisfied, the notice must advise the applicant of the applicant's right to make an application to the Federal Court under subsection (2) and the power of the Court to make an order in accordance with subsection (4) in respect of the application."⁷³ The referenced subsections read as follows:

190D(2) - If the Registrar gives the applicant a notice under subsection (1), the applicant may apply to the Federal Court for a review of the Registrar's decision not to accept the claim [and the Federal Court has the jurisdiction to hear and determine such an application⁷⁴].

190D(4) – If, on an application under subsection (2) in a case to which subsection (1A) applies, the Court is satisfied that:

- (a) prima facie, at least some of the native title rights and interests claimed in the application can be established; and
- (b) at least some time in his or her lifetime, at least one parent of one member of the native title claimant group had a traditional physical connection with any part of the land or waters and would reasonable be expected to have maintained that connection but for things done (other than the creation of an interest in relation to land or waters) by:
 - (i) the Crown in any capacity; or
 - (ii) a statutory authority of the Crown in any capacity; or
 - (iii) any holder of a lease over any of the land or waters, or any person acting on behalf of such a holder of a lease;

the Court may order the Registrar to accept the claim for registration.

As a result, the *Native Title Act* provides the Federal Court with some degree of discretionary authority in determining the merits of continuing native title claims and, thus, their ability to be formally registered. Whether or not this discretionary authority will ultimately benefit Indigenous land claimants, however, has yet to be conclusively determined in practice.⁷⁵

⁷³ NTA 190D(1A).

⁷⁴ NTA 190D(3).

⁷⁵ "The Registrar, and [National Native Title] Tribunal staff to whom the Registrar has delegated his power under s. 99 of the NTA ('the delegates'), have made eighteen substantive decisions on the registration of claims. As may as 600 other claims are awaiting registration nationally." [McIntyre, Ritter and Sheiner (1999), pp. 9-10].

If a claim of continuing native title can not be registered, however, it can still be the subject of determination by the Federal Court (see below). In the interim, however, the ‘right to negotiate’ provisions of the *Native Title Act* are not called into operation and, as a result, any actions taken in respect of the lands or waters under claim (i.e. ‘future acts’) may proceed unhampered until a positive determination of continuing native title/continuing native title rights and interests is confirmed by the Federal Court. (See Appendix 3 – Overview of the Right to Negotiate Process).

iv) Phase 3 - ‘Notification’

Having made a ‘registration determination’ (positive or negative), the Native Title Registrar must then, as soon as is reasonably practicable, provide copies of the claimant application (and its accompanying documentation) to the relevant State/Territory Minister(s)⁷⁶ and to the relevant representative Aboriginal/Torres Strait Islander body⁷⁷, for the area specified in the application⁷⁸. At the same time it must also notify the public of the claimant application (and its ‘registration status’) in a manner determined by the Commonwealth Minister (for example: in newspapers [including newspapers catering mainly or exclusively to Aboriginal Peoples or Torres Strait Islanders]; by radio

⁷⁶ Defined in s. 253 as: the Premier of a State/Chief Minister of a Territory; or, a Minister of the Crown of the State/ Minister of the Territory nominated in writing by the Premier of the State/ Chief Minister of the Territory.

⁷⁷ Also referred to Native Title Representative Bodies (NTRBs), Aboriginal/Torres Strait Islander Representative Bodies are regionally based Indigenous representative bodies recognised, but not created, by the *Native Title Act* for the purpose of fulfilling several statutory functions related to the implementation of the *Native Title Act*. See NTA s. 202, 203A and 203AA as well as section V of this chapter.

⁷⁸ NTA s. 66(2) and (2A)

broadcasts; or, by television transmissions)⁷⁹ as well as give notice containing the details of the application (and its ‘registration status’) to all of the following persons or bodies:

- i) any registered native title claimant in relation to any of the area covered by the application; and
- ii) any registered native title body corporate⁸⁰ in relation to any of the area covered by the application; and
- iii) any representative Aboriginal/Torres Strait Islander body for any of the area covered by the application; and
- iv) ... any person who, when the application was filed in the Federal Court, held a proprietary interest, in relation to any of the area covered by the application, that is registered in a public register of interests in relation to land or waters maintained by the Commonwealth, a State or Territory; and
- v) the Commonwealth Minister; and
- vi) any local government body for any of the area covered by the application; and
- vii) if the Registrar considers it appropriate ... any person whose interests may be affected by a determination in relation to the application.⁸¹

According to s. 66(10)(c) of the *Native Title Act*, such notification must include a statement to the effect that:

- a) ... as there can be only one determination of native title for an area, if a person does not become a party in relation to the application, there may be no other opportunity for the Federal Court, in making a determination, to take into account the person’s native title rights and interests in relation to the area concerned⁸²; and
- b) a person who wants to be a party in relation to the application must notify the Federal Court, in writing, within the period of 3 months starting on the notification day .. or, after that period, get the leave of the Federal Court under s. 84(5)^[83] to become a party.⁸⁴

⁷⁹ NTA s. 66(3)(d) and 252.

⁸⁰ A native title body corporate is a prescribed body registered on the Native Title Register as holding the native title rights and interests of a recognized native title holder(s) on trust. See NTA s. 224.

⁸¹ NTA s. 66(3).

⁸² NTA s. 66(10)(b)

⁸³ This section reads as follows: “The Federal Court may at any time join any person as a party to the proceedings, if the Court is satisfied that the person’s interest may be affected by a determination in the proceedings.”

These ‘notification’ procedures of the *Native Title Act* are designed to ensure that all parties potentially affected by a native title determination are aware that: (i) a claim of continuing native title has been filed with the Federal Court; (ii) a claim of native title has been accepted or rejected for registration (consequently making them aware of whether, or to what extent, the ‘future act’ regime applies); and, (iii) that they must give notice to the Federal Court if they wish their rights and interests to be considered during the native title determination process.

This having been said, however, section 84(5) of the *Native Title Act* allows the Federal Court to “at any time join any person as a party to [native title determination] proceedings, if the Court is satisfied that the person’s interests may be affected by a determination in the proceedings”, and section 84(5A) of the *Native Title Act* allows the Federal Court to ensure proper representation for any person(s) who has “a public right of access over, or use of, any of the area covered by [a claimant] application.” As a result, it is unlikely that any *bone fide* holders of rights and interests in respect of a claim area who do not formally respond to the Federal Court during the three month ‘notification period’ will be prevented from participating in proceedings related to claimant applications for a determination of native title.

v) Phase 4 – ‘Mediation’

According to s. 81 of the *Native Title Act*, “[t]he Federal Court has jurisdiction to hear and determine applications filed in the Federal Court that relate to native title and that jurisdiction is exclusive of the jurisdiction of all other courts except the High Court

⁸⁴ NTA s. 66(10)(c).

[to which Federal Court ordered native title determination appeals may be made].”⁸⁵

According to section 86B of the *Native Title Act*, however, the Federal Court “must refer every application [made to it] under s. 61 [which refers to ‘claimant applications’, ‘non-claimant applications’, ‘revised native title determination applications’ and ‘compensation applications’] to the [National Native Title Tribunal⁸⁶] for mediation ... as soon as practicable after the end of the [notification] period.”⁸⁷ The purpose of mediation is to assist parties to reach an agreement on some or all of the following matters:

- a) whether native title exists or existed in relation to the area of land or waters covered by the application;
- b) if native title exists or existed in relation to the area of land or waters covered by the application:
 - i) who holds or held the native title;
 - ii) the nature, extent and manner of exercise of the native title rights and interests in relation to the area;
 - iii) the nature and extent of any other interests in relation to the area;
 - iv) the relationship between the rights and interests in subparagraphs (ii) and (iii) (taking into account the effects of this Act);
 - v) to the extent the area is not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease – whether the native title rights and interests confer or conferred possession, occupation, use and enjoyment of the land or waters on its holders to the exclusion of all others.⁸⁸

⁸⁵ NTA s. 81.

⁸⁶ The NNTT is a statutory body created by the *Native Title Act, 1993* for the purpose of facilitating implementation of the *Native Title Act* (NTA Pt. 6, Div. 1).

⁸⁷ NTA s. 86B(1).

⁸⁸ NTA s. 86A(1). In the case of ‘compensation applications’ the purpose of mediation also includes assisting the parties to come to an agreement on: the amount or kind of compensation payable; the name of the person(s) entitled to any compensation or the method for determining the person(s); the method (if any) for determining the amount or kind of compensation to be given to each person; and/or, the method for determining any dispute regarding the entitlement of a person to an amount of compensation [see NTA s. 86A(2)].

At any time, however, “[t]he [Federal] Court may, on application by a party to the proceeding, or of its own motion, make an order that there be no mediation in relation to the whole of the proceeding or a part of the proceeding”⁸⁹ and the Federal Court must make an order that there be no mediation if it considers that:

- a) any mediation will be unnecessary in relation to the whole or that part [of the proceeding], whether because of an agreement between the parties about the whole or the part of the proceeding or for any other reason [see below]; or
- b) there is no likelihood of the parties being able to reach agreement on, or on facts relevant to, any of the matters set out in subsection 86A(1) or (2) [which describe the matters subject to mediated agreements] in relation to the whole or that part [of the proceeding]; or
- c) the applicant in relation to the application under section 61 has not provided sufficient detail (whether in the application or otherwise) about the matters mentioned in subsection 86A(1) or (2) in relation to the whole or that part [of the proceeding].⁹⁰

The Federal Court may also order ongoing mediation to cease if it considers that “(a) any future mediation will be unnecessary in relation to the whole or the part [of the proceeding]; or (b) there is no likelihood of the parties being able to reach agreement on, or on facts relevant to, [any relevant matters]”⁹¹ or (c) it receives, at any time after three months after the start of mediation, an application from a party to the proceeding to cease mediation⁹². The Federal Court must, however, make an order to cease ongoing mediation “[i]f the party making the application is: (a) the applicant ...; or (b) the Commonwealth, a State or a Territory.”⁹³

⁸⁹ NTA s. 86B(2).

⁹⁰ NTA s. 86B(3).

⁹¹ NTA s. 86C(1).

⁹² NTA s. 86C(2).

⁹³ NTA s. 86C(3).

As a result, although *Native Title Act* provides the Federal Court with a some discretion over the duration (if any) of the mediation process. It also provides the Federal Court with fairly detailed guidelines for how this discretion is to be exercised in any given situation.

vi) Phase 5 – Securing a ‘Native Title Determination Order’

According to s. 225 of the *Native Title Act*,

A *determination of native title* is a determination whether or not native title exists in relation to a particular area (the *determination area*) of land or waters and, if it does exist, a determination of:

- (a) who the persons, or each group of persons, holding the common or group rights comprising native title are; and
- (b) the nature and extent of the native title rights and interests in relation to the determination area; and
- (c) the relationship between the rights and interests in paragraphs (b) and (c) (taking into account the effect of this Act); and
- (d) to the extent that the land or waters in the determination area are not covered by a non-exclusive agricultural lease or a non-exclusive pastoral lease [where the rights of the lease holder always take precedence over the rights of any co-existing native title holders] – whether the native title rights and interests confer possession, occupation, use and enjoyment of that land or waters on the native title holders to the exclusion of all others.⁹⁴

As was explained above, only the Federal Court (or in the case of an appeal, the High Court) has the jurisdiction to hear and determine applications that relate to native title determinations. In performing these functions, “[t]he Federal Court is bound by the rules of evidence, except to the extent that the Court determines otherwise” and, in conducting its proceedings “may take account of the cultural and customary concerns of

Aboriginal peoples and Torres Strait Islander, but not so as to prejudice unduly any other party to the proceedings.”⁹⁵ It may also:

- a) receive into evidence the transcript of evidence in any other proceeding before:
 - i) the Court; or
 - ii) another court; or
 - iii) the NNTT [National Native Title Tribunal]; or
 - iv) a recognised State/Territory body; or
 - v) any other person or body;and draw any conclusions of fact from that transcript that it thinks proper; and
- b) receive into evidence the transcript of evidence in any proceedings before the assessor [i.e. an assessor appointed under Part VA of the *Federal Court of Australia Act, 1976*] and draw any conclusions of fact from that transcript that it thinks proper; and
- c) adopt any recommendation, finding, decision or judgment of any court, person or body of any kind mentioned in any of subparagraphs (a)(i) to (v).⁹⁶

As a result, the Federal Court has a tremendous degree of discretion over the material evidence and other findings that will ground its ultimate native title determination order. This makes it very difficult for native title claimants (and others) to make reasonable predictions about the outcome of any given native title determination proceeding.

Furthermore, although a native title determination order can only be made by the Federal Court (or by the High Court of Australia, if a native title determination order made by the Federal Court is successfully appealed), the *Native Title Act* actually provides for three distinct types of native title determination orders to be contemplated by the Federal Court – ‘unopposed’ determinations, ‘consent’ determinations, and ‘litigated’

⁹⁴ NTA s. 225. “Note: The determination may deal with the matters in paragraphs (c) and (d) by referring to a particular kind or particular kinds of non-native title interests” [Commonwealth of Australia (1998), p 297].

⁹⁵ NTA s. 82(1) and (2).

⁹⁶ NTA s. 86.

or 'court ordered' determinations. Each of these three types of native title determination orders will now be discussed in turn in order to provide a clearer picture of the manners by which the *Native Title Act* purports to 'recognize and protect' continuing native title.

a) 'Unopposed' Determinations

If, after the three month 'notification period' has expired, a claimant application for a determination of native title is 'unopposed', meaning that "the only party is the applicant or ... [that] each other party [has notified] the Federal Court in writing that he or she does not oppose an order in, or consistent with, the terms sought by the applicant"⁹⁷ and "the Federal Court is satisfied that an order in, or consistent with, the terms sought by the applicant is within the power of the Court [to make]"⁹⁸ it may "make such an order without holding a hearing or, if a hearing has started, without completing the hearing."⁹⁹

Such determination orders are referred to as 'unopposed' native title determinations because they are made by the Federal Court in the event that no one contests a native title determination application.

b) 'Consent' Determinations

Similarly, if an applicant and other relevant parties to a native title determination proceeding reach an agreement on the terms of a native title determination order on their

⁹⁷ NTA s. 86G(2).

⁹⁸ NTA s. 86G(1)(b).

⁹⁹ NTA s. 86G(1).

own, or through mediation facilitated by the National Native Title Tribunal (NNTT)¹⁰⁰, the Federal Court may, if it appears to be appropriate to do so, “make an order in, or consistent with, those terms without holding a hearing or, if a hearing has started, without completing the hearing.”¹⁰¹

Native title determination orders of this sort are commonly referred to as ‘consent determinations’ because they simply reaffirm (in whole or in part) the native title determination order agreed upon by the parties to a native title determination proceeding.

c) ‘Litigated’ or ‘Court Ordered’ Determinations

If a native title determination application is opposed and no agreement on a native title determination is achieved through mediation or otherwise, however, the parties to the proceeding must argue their cases in a trial-like process and submit to a native title determination made by the Federal Court itself.¹⁰² This type of native title determination order is generally referred to as a ‘litigated’ or ‘court imposed’ native title determination

¹⁰⁰ “The NNTT is established by part 6 of the Native Title Act. It comprises a President and other presidential members (who must be judges of the Federal Court, former judges of any federal court or State or Territory Supreme Court, or have been enrolled as a legal practitioner for 5 years), and other members (who must have special knowledge about land management, dispute resolution or Aboriginal or Torres Strait Islander societies) (s. 110). The NNTT’s functions are performed by its members, or by consultants appointed under s. 131A [of the *Native Title Act*]. Its functions include mediation of native title and compensation claims referred to it by the Federal Court (s. 108(1A)), and assisting or mediating, if requested to do so, under other provisions of the Native Title Act (s. 108(1B)) [for example, a request to assist with a statutory access agreement or an indigenous land use agreement (s. 44B(4), and ss. 24BF, 24CF and 24DG). Other applications can be made to the NNTT or the Registrar for determinations: under the right to negotiate process (Division 2 of Part 3); and of objections against the registration of an indigenous land use agreement (Division 2A of Part 3). The NNTT can take into account the cultural and customary concerns of Aboriginal people and Torres Strait Islanders in all its functions, but not so as to unduly prejudice any other party (s. 109(2)). It is not bound by technicalities, legal forms or rules of evidence.” [Australian Government Solicitor (1998), p. 52].

¹⁰¹ NTA s. 87(2).

¹⁰² See NTA, Pt. 4, Div. 2 (i.e. s. 88-93).

order for obvious reasons and is arguably the most unpredictable of the three types of native title determinations orders made possible by the terms of the *Native Title Act*.

Figure 11 - Native Title Determinations as at March 2004

Total number of native title determinations in Australia	49
Determinations that native title exists in the entire determination area	32
Determinations that native title does not exist in the determination area	17
Consent determinations	26
Litigated determinations	12
Unopposed determinations	11
Determinations under appeal	5
Determinations involving claimants applications	36
Determinations involving compensation applications	1
Determinations involving non-claimant applications	12

Source: National Native Title Tribunal, "Native Title Applications", <http://www.nntt.gov.au/applications/determinations.html>. Reproduced with permission.

d) Other Considerations

It is important to note, however, that the *Native Title Act* gives the Federal Court the authority to reject all or some of any ‘unopposed’, ‘negotiated’ or ‘mediated’ native title determination and substitute its own, self-determined native title determination order, if it deems that relevant evidence and/or findings merit the rejection of all or some of the proposed native title determination order. Furthermore, as was explained earlier in this chapter, the Federal Court may also issue a ‘revised native title determination order’ (in response to a ‘revised native title determination application’) if it considers that events that have taken place that cast a shadow of ‘incorrectness’ on its previous native title determination order or that the interest of justice otherwise require a revised native title

determination order.¹⁰³ As a result, it is truly the Federal Court, and not Indigenous Peoples, (post-)colonial governments or relevant third parties, that ultimately controls the outcome of all native title determination applications.

vii) Other Relevant Aspects of the Native Title Determination Process

Given that the Federal Court's native title determination orders to date have applied ordinary judicial rules (such as *res judica*) and *Native Title Act* provisions in an inconsistent and often conflicting manner¹⁰⁴, it is difficult to determine whether both 'positive' and 'negative' native title determination orders are appropriately attributed to the judicial characterization of native title at common law, the terms of the *Native Title Act*, or the Federal Court itself. What is certain, however, is that "even after its recognition, native title is considered by the court to be 'inherent fragile'¹⁰⁵, and that its enjoyment is 'precarious'¹⁰⁶ [emphasis original]."¹⁰⁷ As Mantziaris and Martin explain,

... the judicial view that there may be partial extinguishment of native title renders the content of a recognised native title particularly vulnerable to future depletion. This possibility flows from the view, advanced by a majority of the Full Federal Court in *Western Australia v Ward*, that native title is a divisible 'bundle of rights':

It is possible for some only of those rights to be extinguished by the creation of inconsistent rights by laws or executive act. Where this happens, 'partial extinguishment' occurs. In a particular case a bundle of rights that was so extensive as to be in the nature of a proprietary interest, by partial extinguishment may be so reduced

¹⁰³ See NTA s. 13(5).

¹⁰⁴ See, for example, the summaries of Federal Court determinations provided in *Native Title Newsletter* (Canberra: Native Title Research Unit - Australian Institute for Aboriginal and Torres Strait Islander Studies) available at: http://www.aiatsis.gov.au/rsrch/ntru/ntru_newlet.htm.

¹⁰⁵ *Anderson v Wilson* [2002] FCA at para 84; *Commonwealth v Yarmirr* [1999] FCA 1668; 168 ALR 426 at para 26; *Fejo v Northern Territory* [198] HCA 58; 195 CLR 96 at para 108; *Western Australia v Ward* [2000] FCA 191; 170 ALR 159 at para 65; and, *Yanner v Eaton* [1999] HCA 53; 166 ALR 258 at para 152.

¹⁰⁶ *Western Australia v Commonwealth* (1995) 183 CLR 373 at p. 452. See also: *Members of the Yorta Yorta Aboriginal Community v Victoria* [1998] FCA 1606.

¹⁰⁷ Mantziaris and Martin (2000), p. 52.

that the rights which remain no longer have that character. Further, it is possible that a succession of different grants may have a cumulative effect, such that native title rights and interests that survived one grant that brought about partial extinguishment, may later be extinguished by another grant^{108 109}.

Accordingly, even confirmed incidences of continuing native title/continuing native title rights and interests are highly susceptible to extinguishment and/or erosion over time.

In sum, it is difficult to interpret the political accommodation of *sui generis* native title as significantly improving Indigenous Peoples' practical ability to assert continuing native title and/or exercise continuing native title rights and interests in the post common law recognition era. Instead, the political accommodation of native title (as manifested in the *Native Title Act, 1993* and the *Native Title Amendment Act, 1998*) has simply reinforced the (meagre) initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users whose rights in respect of their traditional territories must ultimately yield whenever a non-indigenous land use is perceived to be necessary.

CONCLUSION

As this chapter has demonstrated, the comprehensive claims process embedded in Canada's comprehensive claims policy arguably provides Indigenous Peoples with a greater practical ability to procure confirmation of continuing native title than does the native title determination process embedded in Australia's *Native Title Act*. This is owing to the fact that Canada's comprehensive claims process takes the initial and

¹⁰⁸ *Western Australia*, *supra* note 105, at para 109. See also: Beaumont and von Doussa JJ (North J dissenting) at paras 55-120 and 310 in the same. Assent with this dictum was expressed in *Anderson*, *supra* note 105, Black CJ and Sackville J at para 94, and indirectly at paras 267-270 (Beaumont J).

historically contingent recognition of Indigenous Peoples as potential (if not actual) land owners (confirmed in *Calder*, etc.) as its logical starting point, whereas Australia's native title determination process takes the initial and historically contingent recognition of Indigenous Peoples as mere land inhabitants and/or land users (confirmed in *Mabo*, etc.) as its logical starting point.

As this chapter has also demonstrated, however, neither Canada's comprehensive claims process nor Australia's native title determination process has significantly improved Indigenous Peoples' practical ability to secure formal confirmation of continuing native title in the wake of native title's recognition at common law. This is owing to the fact that both policies place a heavy 'burden of proof' on contemporary Indigenous land claimants and afford (post-)colonial governments (and in the case of Australia, post colonial legal institutions) with a tremendous degree of discretionary authority over the manner in which native title claims are processed and resolved/determined.

These findings draw attention to the fact that although the recognition of native title at common law did compel the central governments of Canada and Australia to introduce national policies designed to facilitate the resolution of continuing native title claims, it also compelled these same governments to ensure that the outcome of these policies would not significantly disrupt the non-native title rights and interests of (post-) colonial governments and non-indigenous people. As a result, both Canada's comprehensive claims process and Australia's native title determination process are more meaningfully understood as contemporary versions of the Indigenous land acquisition

¹⁰⁹ Mantziaris and Martin (2000), p. 52.

policies developed during the early years of colonial settlement than they are as novel political responses to the contemporary recognition/confirmation that native title constitutes a judicially defensible *sui generis* real property right at common law.

These findings belie the popular notion that Indigenous Peoples' rights in respect of their traditional territories have been the subject of a significantly expanded political accommodation in the post-common law recognition eras of Canada and Australia, and reinforce the critical opinion of Indigenous people and increasing numbers of Indigenous Studies scholars that the political accommodation of indigenous rights to land is little different today than it was prior to the recognition of native title at common law.

CONCLUSION

Because increasing numbers of Indigenous people are choosing to work within the legal and political institutions of their colonisers to achieve native title recognition and respect, a critical question is: can (post-)colonial legal and political institutions meaningfully redress the historic and ongoing dispossession of Indigenous Peoples or does the colonial nature of these institutions inherently predispose them to (intentionally or unintentionally) perpetuate dispossession? This study has endeavoured to answer this critical question by comparing the legal and political accommodation of native title in two settler dominions of the Anglo Commonwealth – Canada and Australia – where the contemporary recognition of native title at common law (and its political antecedents) has been the subject of two very different interpretations.

As was explained in the Introduction to this study, much of the popular and academic commentary on the recognition of native title at common law in Canada and Australia has portrayed this act of recognition as an important, if not monumental, accommodation of indigenous rights to land. According to this body of literature, Indigenous Peoples' contemporary ability to successfully assert and defend claims of continuing native title at common law and through central government policies rightly marks the recognition of native title at common law as a significant turning point in the legal and political accommodation of indigenous rights to land. As was also explained in

the Introduction to this study, however, many Indigenous people and increasing numbers of Indigenous Studies scholars have been more critical of (post-)colonial legal and political institutions' handling of the native title issue. According to this body of literature, the judicial characterization of native title at common law and the native title claims processes designed by (post-)colonial governments have so limited the concept of 'continuing native title' that the practical ability of Indigenous Peoples to meaningfully reconcile their historic (and ongoing) dispossession is little different today than it was prior to the recognition of native title at common law.

In order to evaluate the relative merits of these two counterpoised bodies of literature, a theoretically rigorous construction path dependence was extrapolated from the work of James Mahoney, Paul Pierson and Margaret Levi for use as an explanatory analytic framework. According to this construction of path dependence, an institutional arrangement or policy trend is appropriately characterized as 'path dependent' if it is initiated by a contingent event and follows a relatively deterministic pattern. For further theoretic value, this construction of path dependence also distinguishes between two distinctive types of path dependent sequences: those which are 'self-reinforcing' and those which are 'reactive. As explained by Mahoney:

In the case of a self-reinforcing sequence, the contingent period corresponds with the initial adoption of a particular institutional arrangement [or policy choice], while the deterministic pattern corresponds with the stable reproduction of this institution [or policy choice] over time. By contrast, in the case of a reactive sequence, the contingent period corresponds with a key breakpoint in history, while the deterministic pattern corresponds with a series of reactions that logically follow from this break point.¹

¹ James Mahoney, "Path Dependence in Historical Sociology", *Theory and Society* 29:4 (2000), p. 535.

Using this construction of path dependence, this study has sought to determine whether the recognition of native title at common law is appropriately characterized as a ‘key break point in history’ from which a ‘reactive’ path dependent sequence (characterized by the formal political recognition and accommodation of continuing native title) followed, or whether the recognition of native title at common law and its political antecedents are appropriately characterized as causally connected events in a ‘self-reinforcing’ path dependent sequence (characterized by the relatively stable reproduction of the initial and historically contingent recognition and accommodation of indigenous rights to land); a self-reinforcing path dependent sequences that was temporarily disrupted, but ultimately was not significantly altered, by the recognition of native title at common law.

I – SUMMARY OF CENTRAL ARGUMENT AND MAJOR FINDINGS

As was explained in chapter 1, the early colonial settlement periods of Canada and Australia were governed by two notably different assumptions on the part of colonial authorities: in the Canadian case colonial authorities assumed that Indigenous Peoples were potential (if not actual) land owners and in the Australian case colonial authorities assumed that Indigenous people were mere land inhabitants and/or land users. As a result, this chapter explained, the colonial authorities of Canada sought to secure Indigenous Peoples’ voluntary surrender of their traditional territories in advance of colonial settlement and the colonial authorities of Australia treated the entire Australian landmass as if it were a legal *terra nullius*.

As chapter 2 went on to explain, these differences in the initial and historically contingent recognition and accommodation of indigenous rights to land in the Canadian and Australian cases provided two notably different contexts for the formal recognition of native title in law and policy. In sum, this chapter argued that while the perceived degree of consistency between the initial and historically contingent recognition and accommodation of Indigenous Peoples as potential (if not actual) land owners and the formal recognition of native title at common law in the Canadian case created relatively fruitful grounds for the formal recognition of native title by (post-)colonial governments (i.e. through the adoption of the comprehensive claims policy), the perceived degree of inconsistency between the initial and historically contingent recognition and accommodation of Indigenous Peoples as mere land inhabitants and/or land users and the recognition of native title at common law in the Australian case created relatively hostile grounds for the political recognition of native title (i.e. through the adoption of the *Native Title Act* and the *Native Title Amendment Act*).

The historic and contemporary contours of the native title issue having been established, the body of this study proceeded to offer a critical comparative analysis of native title's formal accommodation at common law and in central government policy. Beginning with the formal accommodation of native title at common law, chapters 3 to 5 drew on the most comprehensive native title decisions to date in order to identify, compare and critically analyze the judicial characterization of native title's source, nature, and content (chapter 3), native title's vulnerability to lawful extinguishment (chapter 4) and native title's proof criteria (chapter 5) at common law. Summarized in greater detail in Appendix 2, the central finding of these chapters was that while native

title has been characterized as a relatively strong (i.e. proprietary) right to land in the Canadian case it has been characterized as a relatively weak (i.e. personal) right to land in the Australian case. As a result, these chapters argued, native title claimants are likely to experience more difficulty asserting and defending contemporary claims of continuing native title in Australia than they are in Canada. Belying the commonly held assumption that established common law principles will produce similar outcomes when applied to similar cases, these findings were argued to support the ‘self-reinforcing’ path dependence thesis because they evidence a high degree of consistency between the initial and historically contingent recognition of indigenous rights to land and the judicial characterization of native title at common law. In sum, although the recognition of native title at common law initiated rather extensive (and ongoing) native title litigation (as well as extensive [and ongoing] indigenous rights litigation, more generally speaking) and a wealth of judicial reasoning on the appropriate accommodation of native title within the hierarchy of ordinary common law land holdings, it did not ultimately result in a significantly different accommodation of indigenous rights to land from that which was adopted by colonial authorities during the early years of colonial settlement in Canada and Australia respectively.

Because the political recognition and accommodation of native title in central government policy has been identified as a significant antecedent to the recognition of native title at common law, this study proceeded to present a critical comparative analysis of those central government policies introduced in the wake of native title’s recognition at common law – Canada’s comprehensive claims policy and Australia’s *Native Title Act* (as amended). Focusing attention on the nature, goals and assumptions of these two

policies (chapter 6) and the practical limitations of their native title claims (Canada) and native title determination (Australia) processes (chapter 7), this critical comparative analysis revealed that while Canada's comprehensive claims policy has provided Indigenous Peoples with a relatively greater ability to assert and defend claims of continuing native title than has Australia's *Native Title Act*, neither policy has significantly departed from the initial and historically contingent accommodation of indigenous rights to land identified in chapter 1. In sum, by teasing out Indigenous Peoples' practical ability to successfully procure formal confirmation of 'continuing native title' under the auspices of Canada's comprehensive claims policy and Australia's *Native Title Act*, these two chapters pointedly revealed how the initial and historically contingent recognition and accommodation of indigenous rights to land and the judicial characterization of native title at common law have interacted in a mutually reinforcing way to significantly limit Indigenous Peoples' practical ability to reconcile their historic (and ongoing) dispossession in the wake of native title's recognition at common law. Stated another way, although the recognition of native title at common law arguably disrupted the self-reinforcing path dependent sequence of native title accommodation initiated during the early years of colonial settlement (causing the central governments of Canada and Australia to initiate 'new' indigenous land claims policies), it did not ultimately result in indigenous land claims processes that significantly improve Indigenous Peoples' practical ability to successfully procure formal confirmation of their unique territorial rights (i.e. continuing native title) in respect of actual tracts of land.

In sum, characterizing native title's legal and political accommodation as a 'self-reinforcing' path dependent sequence that was temporarily disrupted, but ultimately not

significantly altered, by the recognition of native title at common law, this study has argued that the different degrees of recognition and accommodation afforded native title by the legal and political institutions of (post-)colonial Canada and Australia can be meaningfully explained with reference to these countries' different (and historically contingent) recognition and accommodation of indigenous rights to land during the earliest years of colonial settlement.

This interpretation of events not only provides a meaningful explanation for colonial history's continuing (though perhaps surreptitious) role in the legal and political accommodation of native title in the Canadian and Australian cases, it also provides a meaningful explanation for this study's four central findings:

1. the contemporary legal and political recognition of native title is relatively more extensive and secure in the Canadian case than it is in the Australian case;
2. the judicial construction of native title at common law has produced a relatively stronger real property right in the Canadian case than it has in the Australian case;
3. Canada's comprehensive claims policy has given Indigenous Peoples a relatively stronger ability to assert and defend claims of continuing native title than has Australia's *Native Title Act*; and
4. the ability of Indigenous Peoples to successfully procure formal legal and/or political confirmation of their unique territorial rights (i.e. continuing native title) is little different in Canada and Australia today than it was prior to the recognition of native title at common law and the subsequent recognition of native title in central government policy.

II – THE FUTURE OF NATIVE TITLE ACCOMMODATION IN CANADA AND AUSTRALIA: REFLECTIONS ON REPRODUCTION AND CHANGE IN SELF-REINFORCING PATH DEPENDENT SEQUENCES

Although the central findings of this study seem to suggest that the (post-)colonial legal and political institutions of Canada and Australia are inherently disposed to reproduce the initial and historically contingent recognition and accommodation of indigenous rights to land, this is not necessarily the case. As was noted in the Introduction to this study, there are at least six theoretical frameworks that may be employed to explain (and possibly predict) reproduction and change in self-reinforcing path dependent sequences – utilitarian, functional, power, structural, cultural/deontological, and morphogenetic (see Figure 12). A brief examination of each of these frameworks will now be offered in order to shed some light on the future of native title accommodation in Canada and Australia.

Figure 12 - Typology of Path-Dependent Explanations of Reproduction and Change in Self-Reinforcing Path Dependent Sequences²

	Morphogenetic Explanation				
	Utilitarian Explanation	Functional Explanation	Power Explanation	Structural Explanation	Cultural/Deontological Explanation
Mechanism of Reproduction	Institution/ policy trend is reproduced through the rational cost-benefit assessments of actors	Institution/ policy trend is reproduced because it serves a function for an overall system(s)	Institution/ policy trend is reproduced because it is supported by an elite group of actors	Institution/ policy trend is reproduced through established rules, norms, and practices	Institution/ policy trend is reproduced because dominant actors believe it is just or appropriate
Mechanism of Change	Increased competitive pressures; learning processes	Exogenous shock(s) that transforms system needs	Weakening of elites and strengthening of subordinate group(s)	Change(s) in structural conditionings	Change(s) in cultural conditionings

i) Utilitarian Explanation

According to the utilitarian explanation of reproduction and change in self-reinforcing path dependent sequences, “actors rationally chose to reproduce institutions [or policy trends] ... because any potential benefits of transformation are out weighed by the costs.”³ As a result, “change occurs when it is no longer in the self-interest of actors to reproduce a given institution [or policy trend].”⁴ As Mahoney explains:

Drawing on the logic of the market, utilitarian theorists often emphasize how increased competitive pressures can lead to institutional transformations. They may also emphasize learning processes that help

² Adapted from: ‘Table 1: Typology of path-dependent explanations of institutional reproduction’ in Mahoney (2000), p. 517.

³ Mahoney (2000), p. 517.

⁴ Ibid, p. 518.

encourage them to absorb short-term costs and make a change in the present^{5,6}.

According to the utilitarian framework, then, the original native title accommodation regimes of Canada and Australia have persisted despite native title's formal recognition at common law because (post-)colonial authorities continue to benefit from (or, at least, do not significantly suffer under) the existing native title accommodation regimes. As a result, a new (or significantly altered) legal and/or political accommodation of native title is not predicted to take shape in either country unless or until the potential benefits of embarking upon a new native title accommodation path are perceived to outweigh the existing benefits of reinforcing the initial and historically contingent recognition and accommodation of indigenous rights to land.

This might result from a dramatic elevation in the economic, political and/or social costs associated with the existing native title accommodation regime. For example, the central governments of Canada and Australia might consider altering their existing native title accommodation regimes if:

- the resources (money, time, expertise, etc.) needed to manage native title litigation and/or extra-judicial native title claims resolution rise or fall dramatically;
- the existing legal and/or political accommodation of native title causes a change (positive or negative) in economic development prospects;
- the electorate becomes dissatisfied with the existing native title regime;
- native title claimants and/or their supports engage in activities (strikes, protests, sabotage, etc.) that undermine the social, economic and/or political stability of Canada/Australia; and/or,

⁵ Oliver E. Williamson, "Transactional Cost Economics and Organizational Theory", *Industrial and Corporate Change* 2 (1993), pp. 116-117. This learning explanation assumes that there are long-run benefits to institutional change.

⁶ Mahoney (2000), p. 518.

- evidence of any of the above in another country leads domestic political actors to re-evaluate the long-term benefits of their existing native title accommodation regimes.

Because Canadian and Australian justices are supposed to be impervious to the socio-political and socio-economic ramifications of their judicial decisions, however, the utilitarian framework does not seem well suited to predicting or explaining change in the *legal* accommodation of native title. As a result, the utilitarian framework has limited theoretical value in the cases (and issue) at hand.

ii) Functional Explanation

According to the functional explanation for reproduction and change in self-reinforcing path dependent sequences, institutions or policy trends are understood to be reproduced because of their functional consequences for the larger system(s) within which they are embedded.⁷ As a result, change is predicted to occur when an exogenous shock(s) undermines the institution or policy trend's buttressing of the larger system(s).

As Mahoney explains:

Once contingent events initially select a particular institution [or policy trend], functionalist logic identifies predictable self-reinforcing processes: the institution [or policy trend] serves some function for the system, which causes the expansion of the institution [or policy trend], which enhances the institution's [or policy trend's] ability to perform the useful function, which leads to further institutional [or policy trend] expansion and eventually institutional [or policy trend] consolidation. Thus, system functionality replaces the idea of efficiency in utilitarian accounts as the mechanism of institutional reproduction ...

Functional explanations assume the existence of self-regulating systems, and thus ... change usually requires an exogenous shock that puts pressure on the overall system, making a given institution's [or policy trend's]

⁷ Ibid, p. 519.

function obsolete and demanding its transformation to preserve the system in the new environmental setting^{8,9}.

Given that the initial and historically contingent accommodations of indigenous rights to land in the Canadian and Australian cases respectively were indisputably designed to facilitated the acquisition of land by the Crown and her colonists, and given that each country's accommodation regime has supported its colonial and (post-)colonial development, the functional frameworks seems well suited to explaining policy trend reproduction in the cases at hand. Given that neither the exogenous shock of native title litigation (for [post-] colonial legal institutions) nor the exogenous shock of native title's recognition at common law (for [post-]colonial political institutions) resulted in a significantly altered legal and/or political accommodation of indigenous rights to land, however, it is difficult to imagine an exogenous shock that could change the course of each country's native title accommodation regime in the future. As a result, the functionalist framework seems ill suited to predicting change in the legal and political accommodation of native title in Canada and Australia.

iii) Power-Based Explanation

Like the utilitarian explanation of reproduction and change in self-reinforcing path dependent sequences, the power-based explanation of reproduction and change in self-reinforcing path dependent sequences assumes that actors make decisions by weighing costs and benefits. Unlike the utilitarian explanation, however, the power-

⁸ Kenneth E. Bock. "Evolution, Function and Change", *American Sociological Review* 28:2 (1963), pp. 229-237; Ronald Philip Dore, "Function and Change" *American Sociological Review* 26 (1961), pp. 843-853; Talcott Parsons, *The Social System* (New York: Free Press, 1951).

based explanation “emphasizes that institutions [and policy trends] distribute costs and benefits unevenly, and ... stress[es] that actors with different endowments of resources will typically have conflicting interests vis-à-vis institutional [or policy trend] reproduction.”¹⁰ As Mahoney explains:

Once [an institution or policy trend] develops ... it is reinforced through predictable power dynamics: the institution [or policy trend] initially empowers a certain group at the expense of other groups; the advantaged group uses its additional power to expand the institution [or policy trend] further; the expansion of the institution [or policy trend] increases the power of the advantaged group; and the advantaged group encourages additional institutional [or policy trend] expansion.¹¹

According to the power-based framework, then, the initial and historically contingent accommodation of indigenous rights to land empowered colonial newcomers by permitting them to acquire traditional Indigenous territories with relative ease. This led to a steady increase in the socio-economic and socio-political capital of non-indigenous people (and to a concomitant decline in the socio-economic and socio-political capital of Indigenous Peoples), which permitted the expansion of colonial/ (post-)colonial legal and political institutions and their self-serving, self-reinforcing accommodation of indigenous rights to land. Although the recognition of native title at common law threatened this accommodation regime (and perhaps temporarily disrupted it), the socio-economic and socio-political power of non-indigenous people and ‘their’ legal and political institutions (vis-à-vis Indigenous people and their legal and political institutions) facilitated an accommodation of native title at common law and in central government policy that reinforced (rather than significantly altered) the pre-existing

⁹ Mahoney (2000), pp. 519-521.

¹⁰ Ibid, p. 521.

accommodation of indigenous rights to land. In sum, the power-based framework reasonably assumes that the initial and historically contingent accommodation of indigenous rights to land in Canada and Australia empowered non-indigenous people at the expense of Indigenous people and thus permitted colonial and (post-)colonial legal and political institutions to perpetuate a colonial land acquisition regime that worked in the favour of non-indigenous people.

According to the power-based framework, however, mechanisms of change are built into self-reinforcing path-dependent sequences. As Mahoney explains:

Power-based accounts assume that institutional reproduction is a conflictual process in which significant groups are disadvantaged by institutional [or policy trend] persistence. The presence of this conflict means that a dynamic of potential change is built into institutions [or policy trends], even as the dynamic of self-reinforcement also characterizes institutions [or policy trends]. Power-based institutions [or policy trends] may reproduce themselves until they reach a critical threshold point, after which time self-reinforcement gives way to the inherently conflictual aspects of the institution [or policy trend] and eventually to institutional [or policy trend] change. For example, some analysts stress that the reproduction of elite-supported institutions [or policy trends] may eventually disadvantage subordinate groups to the point that these groups successfully challenge the prevailing arrangements^{12 13}.

Given that neither the Nisga'a Nation's successful¹⁴ litigation of its continuing native title claim [Canada] nor the Meriam People's successful litigation of their continuing native title claim [Australia] amounted to a 'successful challenge of prevailing arrangements' (because neither resulted in a significant change in either the pre-existing legal or

¹¹ Ibid.

¹² Michael Buraway, *The Politics of Production: Factory Regimes under Capitalism and Socialism* (London: Verso, 1985), pp. 85-86.

¹³ Mahoney (2000), p. 523.

¹⁴ 'Successful' in the sense that it resulted in the formal recognition of native title at common law.

political accommodation of indigenous rights to land), however, the power-based framework seems to have limited the predictive value in the cases at hand.

This having been said, however, a rupture in the power-based mechanisms of reproduction described above might still be reasonably expected to result from concerted attempts by Indigenous Peoples to counter the relative power of non-indigenous people by, for example:

- assuming positions of authority within (post-)colonial legal and political institutions;
- lobbying for formal Indigenous approval of all non-indigenous land use activities that take place on traditional Indigenous territories;
- frustrating the recreational and commercial activities of non-indigenous people by denying access to their traditional territories (through injunctions, road-blocks, etc.);
- educating non-indigenous people about the link between the dispossession of traditional Indigenous territories and the low socio-economic and socio-political status of many Indigenous people;
- engaging in aggressive native title litigation;
- engaging in protracted native title claims proceedings; and/or,
- pursuing an expanded accommodation of native title at the international level.

Given that Indigenous people generally have limited resources and constitute a very small percentage of the general populations of Canada and Australia, however, their ability to alter existing power dynamics in these ways seems limited at best. Furthermore, given that the existing power dynamics of Canada and Australia are unlikely to change quickly (even if Indigenous people are successful in the types of pursuit just mentioned), the power-based framework is unlikely to provide much solace to those Indigenous and non-indigenous people who are actively pursuing (and/or who

are generally supportive of) a more expansive legal and political accommodation of that common law real property right identified as native title.

In sum, although the power-based framework does seem to provided a reasonable explanation for reproduction and change in the self-reinforcing path dependent sequence of native title accommodation, its explanatory power is notably limited by the fact that the neither the Nisga'a Nation's successful litigation of its continuing native title claim nor the Meriam Peoples' successful litigation of their continuing native title claim resulted in a new and/or significantly altered legal and/or political accommodation of native title.

iv) Structural Explanation

According to the structural explanation for reproduction and change in self-reinforcing path dependent sequences, institutional arrangements and policy trends are reproduced because the rules, norms, practices and expectations that were adopted with them, or that developed to support them, (i.e. 'structural conditionings') place significant constraints upon the behaviour and choices of actors. As Paul Pierson explains:

Both formal institutions (such as constitutional arrangements) and public policies place extensive, legally binding constraints on behaviour ... Policies, grounded in law and backed by the coercive power of state, signal to actors what has to be done and what cannot be done, and they establish many of the rewards and penalties associated with particular activities ... [I]nstitutions induce self-reinforcing processes that make reversals of course increasingly unattractive over time. In contexts of complex social interdependence new institutions and policies are costly to create and often generate learning effects, coordination effects, and adaptive expectations. Institutions and policies may encourage individuals and organizations to invest in specialized skills, deepen relationships with other individuals and organizations, and develop particular political and

social identities.¹⁵ These activities increase the attractiveness of existing institutional arrangements [and policy trends] relative to hypothetical alternatives. As social actors make commitments based on existing institutions and policies, their costs of exist from established arrangements generally rises dramatically.¹⁶

As a result, it is only when existing rules, norms, practices and/or expectations change that new institutions and policy trends are expected to emerge.

According to the structural framework, then, the initial and historically contingent accommodation of indigenous rights to land created an intricate web of rules, norms, practices and expectations that have reinforced the merits of this accommodation regime (relative to alternative accommodation regimes) in spite of (and perhaps in response to) the recognition of native title at common law. This explanation of reproduction seems reasonable given the central findings of this study (i.e. that neither the legal accommodation of native title within the hierarchy of 'ordinary' common law landholdings nor the political accommodation of native title within the existing socio-economic realities of (post-)colonial Canada and Australia represents a significant departure from the initial and historically contingent accommodation of indigenous rights to land). In sum, according to the structural framework the initial and historically contingent accommodation of indigenous rights to land was born out of the application of established rules of common law real property to case-specific understandings of Indigenous Peoples' relationships with their traditional territories. The resulting

¹⁵ It is common to refer to such consequences as sunk costs. Although intuitive, this terminology is unfortunate. Economists use it to mean previous outlays that cannot be recovered and should be regarded as irrelevant to current choices among options. The whole point of path dependence, however, is that these previous choices often are relevant to current action. In cases of increasing returns [or self-reinforcing path dependent sequences, more generally], social adaptations represent investments that yield continuing benefits. Actors may be locked into a current option because massive new investments may be required before some theoretically superior alternative generates a higher stream of benefits.

Indigenous land acquisition regimes of Canada and Australia respectively created (or, perhaps more accurately, respectively reinforced) non-indigenous people's expectations about land acquisition, divestment, and use. Because of the embeddedness of these expectations and the Indigenous land acquisition regimes from which they emerged, the recognition of native title at common law compelled a reinforcement (rather than an alteration) of the initial and historically contingent accommodation of indigenous right to land.

According to the structural framework, then, a new (or significantly altered) legal and/or political accommodation of native title is expected to emerge in the future if, for example:

- (post-)colonial justices relax their application of established common law real property principles in their adjudication of continuing native title claims;
- (post-)colonial political authorities create new (i.e. independent or bi-partisan) authorities and make these bodies responsible for the extra-judicial resolution of continuing native title claims;
- (post-)colonial justices permit Indigenous Peoples' conceptions of lawful land holding, land use, land transfer, etc. to be incorporated into the common law tradition;
- (post-)colonial political authorities permit Indigenous Peoples' conceptions of lawful land holding, land use, land transfer, etc. to be (more) meaningfully incorporated into contemporary Indigenous land claims proceedings; or,
- any of the above (or some other event(s) or circumstance(s)) create new land acquisition, divestment and use expectations on the part of non-indigenous people.

Whether such changes can occur without a significant shift in the ideas and attitudes of non-indigenous Canadians and Australians however, is far from certain. As a result,

¹⁶ Paul Pierson, "Increasing Returns, Path Dependence, and the Study of Politics", *American Political*

although the structural framework provides a meaningful explanation for reproduction in the self-reinforcing path dependent sequence of native title accommodation, its ability to explain or prediction change may be limited due to its inability to explain how structural changes can arise in the absence of cultural or deontological change.

v) Cultural/Deontological Explanation

According to the cultural or deontological explanation for reproduction and change in self-reinforcing path dependent sequences, dominant ideas and attitudes or subjective orientations and beliefs (i.e. ‘cultural conditionings’) hold the key to understanding, explaining and predicting reproduction and change in self-reinforcing path dependent sequence. Like the structural framework, the cultural framework assumes that the underlying ‘conditionings’ that gave birth to (or that developed in response to) a particular institutional arrangement or policy choice influence the behaviour and choices of actors. Unlike the structural framework, however, the cultural framework emphasizes the importance of dominant ‘ideas’ and ‘attitudes’ rather than rules, norms and practices.

As Mahoney explains:

[according to the cultural framework¹⁷], institutional [or policy trend] reproduction occurs because actors view an institution [or policy] as legitimate and thus voluntarily opt for its reproduction. Beliefs in the legitimacy of an institution [or policy] may range from active moral approval to passive acquiescence in the face of the status quo. Whatever the degree of support, however, [cultural] explanations assume the decision of actors to reproduce [or change] an institution [or policy] derives from their self-understandings about what is the right thing to do, rather than from utilitarian rationality, system functionality, or elite power.

Science Review 94:2 (June 2000), p. 259.

¹⁷ Mahoney (2000) refers to this framework as the ‘legitimation framework’ (p.523).

In a path dependent framework, [cultural] explanations maintain that, once a given institution [or policy] is contingently selected, the institution [or policy] will be reinforced through processes of increasing legitimation, even if other previously available institutions [or policies] would have been more legitimate. Increasing legitimation processes are marked by a positive feedback cycle in which an initial precedent about what is appropriate forms a basis for making future decisions about what is appropriate. As a result, a familiar cycle of reinforcement occurs: the institution [or policy] that is initially favored sets a standard for legitimacy; this institution [or policy] is reproduced because it is seen as legitimate; and the reproduction of the institution reinforced its legitimacy.¹⁸

According to the cultural framework, then, the initial and historically contingent accommodation of indigenous rights to land was reproduced in the pre-common law recognition eras of both Canada and Australia because dominant ideas and attitudes about Indigenous Peoples, indigenous rights to land, colonial settlement practices, etc.¹⁹ have continued to support each country's original accommodation of indigenous rights to land. As a result, a new or significantly altered legal and/or political accommodation of native title is not predicted to occur unless or until such ideas and attitudes change.

Given the notable amount of time that has passed since the recognition of native title at common law in Canada (32 years) and Australia (13 years), it is reasonable to presume that if changes in dominant ideas and attitudes resulting from (or perhaps precipitating) native title's recognition at common law were to have an effect on the legal and political accommodation of indigenous rights to land such an effect would be clearly evident by now. If this interpretation is correct, the cultural framework does not

¹⁸ Ibid, pp. 523-524.

¹⁹ In sum, those 'cultural conditionings' affecting colonial and (post-)colonial newcomers to Canada and Australia and 'their' legal and political institutions.

anticipate the emergence of a significantly altered legal and/or political accommodation of indigenous rights to land in Canada and Australia unless or until:

- non-indigenous people, non-indigenous legal authorities and/or non-indigenous political authorities acquire an expanded knowledge of:
 - Indigenous Peoples' pre-colonial and/or contemporary relationships with their traditional territories;
 - the disadvantages suffered by those Indigenous Peoples who have been and/or are being dispossessed of their traditional territories;
 - the disadvantages suffered by those non-indigenous people whose land-based interests have come into conflict with native title claims;
 - the advantages gained by Indigenous Peoples as a result of successful native title claims; or
 - the advantages gained by non-indigenous people as a result of successful and unsuccessful native title claims pursuits;
- the international community puts increased pressure on (post-) colonial legal and political authorities to improve Indigenous Peoples' practical ability to procure confirmation of continuing native title; and/or,
- sectoral capitalist interests put increased pressure on (post-) colonial legal and political authorities to change the existing legal and/or political accommodation of native title.

Given the long history of existing ideas, attitudes, orientations and beliefs about the appropriate accommodation of indigenous right to land, however, it is also reasonable to presume that an even longer time-frame than 13 (Australia) or even 32 (Canada) years may be necessary for the recognition of native title at common law to produce significant change. As a result, although the explanatory power of the cultural framework is relatively strong, its predictive power is somewhat difficult to meaningfully evaluate in the cases at hand.

vi) Morphogenetic Explanation

Drawing on the logic of both the structural and cultural/deontological frameworks, the morphogenetic explanation for reproduction and change in self-reinforcing path dependent sequences asserts that “structural and cultural ‘conditionings’ ... act as an influence on human actors [creating] ‘emergent properties’ and ‘situational logics’ for their interactions [and policy choices].”²⁰ As a result, this framework posits that self-reinforcing path dependent sequences (which are born out of the ‘emergent properties’ and ‘situational logics’ in existence at the time of their initiation) are subject to reproduction until such time as new (or significantly altered) structural and/or cultural ‘conditionings’ produce different ‘emergent properties’ and ‘situational logics’ that favour or provoke a new path trajectory. This is called a ‘morphogenetic cycle’²¹. As Ian Greener explains:

After the period of production, a period of reproduction appears during which the policy or institution [generates] feedback mechanisms that create inertia, or possibly even increasing returns to ‘lock out’ competing political ideas and vested interests. Once the logic of [a] path dependent policy or institution has been established, it will tend to generate an inertial force where established vested and cultural interests have a high opportunity cost for challenging [or changing] the system ... This will tend to lead to morphostasis [‘continuity’], which is most likely to appear where ‘necessary’ emergent properties are reproduced in the policy or institution.²²

...

In a morphogenetic-inspired model of path dependence, forces for change can come endogenously or exogenously, or both. If we have [‘stable’ and ‘interdependent’] relations in both structural and cultural spheres, we have the most powerful force for morphostasis (continuity), with actors engaged in a logic of protection in both areas. Even this, however, can eventually lead to change because of the very limited range of legitimising ideas that

²⁰ Ian Greener, “The Potential of Path Dependence in Political Studies”, *Politics* 24:1 (2005), p. 65.

²¹ *Ibid.*

²² *Ibid.*, p. 68.

are being drawn from, or through the structural vested interest groups becoming so insular that they engage in factional infighting and war on 'deviant' groups or ideas to the extent that they actually cause these groups to begin to establish separate identities and[/or] different ideas.²³ Change may also come from exogenous factors, such as a wider shift in structural societal relations ... Or through the emergence of challenging ideas that are backed by vocal and powerful vested interests ...

Equally, in less stable versions of path dependence, where the structural or cultural systems [are 'in flux' or exhibit 'incompatibility'], attempts at ['reproduction' or 'protection'] can break down This, again, can come about as a result of either endogenous or exogenous factors. Endogenous change would come about as a result of a significant group [or institution] no longer being able to sustain the incompatibility built into the system, and so [initiating a new or significantly altered path trajectory] despite attempts from structural or cultural vested interests to continue to ['reproduce' or 'protect' the existing path trajectory]. Exposure of incompatibilities would tend to result in greater mobilisation from other vested interest groups against them, and the likelihood that actors would be forced into choices about whether or not they would continue to support the [existing path trajectory].²⁴

In sum, the morphogenetic framework predicts that a self-reinforcing path dependent sequence will be reproduced when structural and cultural conditionings are both stable and mutually reinforcing (creating necessary complementarities and stable situational logics) and will be altered when structural and cultural conditionings change or fall out of sync (creating contingent or insufficient complementarities and fluctuating or altered situational logics). (See Figure 13).

²³ M. Archer, *Realist Social Theory: The Morphogenetic Approach* (Cambridge: Cambridge University Press, 1995), pp. 237-239.

²⁴ Greener (2005), pp. 67-68.

Figure 13 - Reproduction and Change in Morphogenetic Cycles

Structural Conditionings	Cultural Conditionings	Emergent Property	Situational Logic	Likelihood of Change
Stable	Stable	Necessary Complementarity • strong interdependence and no incompatibility	Stable • reproduction of existing path trajectory	Low
a) stable b) in flux c) altered d) stable e) altered	a) in flux b) stable c) stable d) altered e) altered	Contingent Complementarity • moderate interdependence and low incompatibility	In Flux • protection or correction of existing path trajectory	Low to Moderate
a) stable b) in flux c) altered d) stable e) altered	a) influx b) stable c) stable d) altered e) altered	Contingent Complementarity • weak interdependence and moderate incompatibility	In Flux or Altered • correction of existing path trajectory or initiation of new/significantly altered path trajectory	Moderate to High
a) in flux b) altered c) altered	a) altered b) in flux c) altered	Insufficient Complementarity • little to no interdependence and high incompatibility	Altered • initiation of new/significantly altered path trajectory	High

Of course, “situational logics do not create compulsory rules for those operating within them, but actors still do have to work within the context where they prevail.”²⁵ As was explained in the earlier discussion of the structural framework, “[a]s social actors make commitments based on existing institutions and policies, their costs of exist from established arrangements generally rises dramatically.”²⁶ As a result,

particular configurations of ... ‘emergent properties’ are more likely to lead to path dependence than others, and a change in emergent properties resulting from interaction between actors and the situation logics that they face will result in the [institution or policy trend] becoming either more

²⁵ Ibid, p. 68.

²⁶ Pierson (2000), p. 259.

morphogenetic (generating change) or morphostatic (generating continuity), depending on the new prevailing situational logic.²⁷

In sum, according to the morphogenetic framework, the mechanism for change in self-reinforcing path dependent sequences is “located not in the cultural or structural spheres, nor in human agency [alone], but in the interactions between all three.”²⁸

Given that dominant attitudes about Indigenous people, indigenous rights and colonial history (‘cultural conditions’) have already evidenced a moderate degree of incompatibility with the initial and historically contingent accommodation of indigenous right to land (‘structural conditionings’) and have effected ‘corrections’ in the existing legal and political accommodation of indigenous rights to land (note, for example: the formal recognition of native title at common law; the introduction of formal native title claims/native title determination processes; the recognition of ‘existing aboriginal and treaty rights’ in sec. 35 of Canada’s *Constitution Act, 1982*; and, the lengthy Senate debates that preceded the passage of Australia’s *Native Title Act, 1993* and *Native Title Amendment Act, 1998*) it seems reasonable to presume that a new or significantly altered legal and/or political accommodation of native title might be precipitated by further changes in cultural and/or structural conditioning. Initiating such change(s) might involve:

- expanding non-indigenous people’s knowledge of the inequities apparent in the existing legal and political accommodation of native title (as this study has attempted to do);
- creating designated Indigenous seats within (post-)colonial legal and political institutions; and/or,
- instituting those types of structural and/or cultural changes described in the two previous section of this chapter.

²⁷ Greener (2005), p. 68.

²⁸ Ibid, p. 69.

In any case, the morphogenetic framework seems reasonably well suited to explaining and predicting reproduction and change in the self-reinforcing path dependent sequences of native title accommodation in the cases at hand.

III – CONCLUDING REMARKS

Statistics on the disadvantages suffered by many Indigenous Peoples and communities are often quoted as an indication of the devastating impact of European newcomers' 'discovery', invasion and colonial settlement of Indigenous territories. It must be remembered, however, that Indigenous Peoples were not and are not simply passive subjects of colonial attitudes and policies. Active resistance against European newcomers' political, economic and social encroachments has been as much a part of colonial history as has Indigenous subjugation, although this history of active resistance is little known to most non-indigenous people. In Canada and Australia, part of this resistance has involved the use of colonial legal and political institutions to assert and gain recognition for a wide range of indigenous rights. The recognition and generous interpretation of such rights, it is argued, will positively enhance the relationship between Indigenous Peoples and non-indigenous peoples, as well as facilitate the spiritual, physical, economic and political rebuilding of Indigenous communities devastated by over 200 years of colonial subjugation.

Although not insignificant portions of Canada and Australia's Indigenous populations have decried working within the Western-European legal and political institutions of their colonizers - questioning the capacity and inclination of these institutions to meaningfully redress historic wrongs and advance Indigenous agendas -

important legal and political advances have arguably been made through these institutions the recognition of native title at common law is often cited as a fundamental case in point. As this study has demonstrated, however, neither the recognition of native title at common law nor its political antecedents have significantly improved Indigenous Peoples' practical ability to reconcile their historic (and ongoing) dispossession. In sum, by drawing attention to the manner in which native title has been practically accommodated at common law and in central government policy, this study has argued that the initial and historically contingent recognition of Indigenous Peoples' as potential (if not actual) land 'owners' (in the Canadian case) and as mere land 'inhabitants' and/or land 'users' (in the Australian case) set in motion two distinctive self-reinforcing path dependent sequences of native title accommodation (one in evidence in the Canadian case and one in evidence in the Australian case) that have yet to be significantly altered by contemporary events.

As this the Conclusion to this study has also sought to demonstrate, however, the existing legal and political accommodation of native title in Canada and Australia is not inherently destined to remain unchanged forever. The difficulty, however, lies in accurately predicting what mechanism(s) of change (if any) will ultimately compel a significant alteration of the existing legal and political accommodation of native title. Although the morphogenetic framework seems reasonably well suited to this task, it can not accurately predict when or whether the requisite change(s) in or incompatibility(ies) between structural and cultural conditionings will occur. As a result, the native title issue is likely to remain an important feature of the indigenous rights agendas of both countries for many years to come.

APPENDIX 1

Excerpt from the *Royal Proclamation of 1763* R.S.C. 1985, App. II, No. 1, October 7, 1763

By the King, A Proclamation George R.

And whereas it is just and reasonable, and essential to our Interest, and the security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them or any of them, as their Hunting Grounds – We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of their respective Governments, as described in their Commissions; as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be Known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.

And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our Said New Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid:

And We do hereby strictly forbid, on Pain of our Displeasure, all our loving subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose First obtained.

And, We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seating themselves upon any Lands within the Countries above described, or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.

And Whereas Great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the Great Prejudice of our Interests, and to the great Dissatisfaction of the said Indians; In Order, therefore, to prevent such Irregularities for the future, and to the End that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council, strictly enjoin and require, that no private Person do presume to make any Purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where, We have thought proper to allow Settlement; but that, if at any Time any of the said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for the Purpose of the Governor or Commander in Chief of our Colony respectively within which they shall lie; and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose ...

Given at our Court at St. James's the 7th Day of October, 1763, in the Third Year of our Reign.

GOD SAVE THE KING

Note: A full text of the *Royal Proclamation of 1763* is available at: http://www.solon.org/Constitutions/Canada/English/PreConfederation/rp_1763.html.

APPENDIX 2

Summary of the Judicial Characterization of Native Title at Common Law in Canada and Australia

	CANADA	AUSTRALIA
SOURCE/ORIGIN	<ul style="list-style-type: none"> • prior occupation (primary source) • pre-existing law • recognition (not creation) by the Royal Proclamation, 1763 	<ul style="list-style-type: none"> • pre-existing laws and customs (primary source) • prior occupation/use • exclusive possession
CRYSTALLIZATION	<ul style="list-style-type: none"> • at sovereignty 	<ul style="list-style-type: none"> • at sovereignty
<p>NATURE</p> <p><i>Dimensions of Sui Generis Native Title</i></p>	<ul style="list-style-type: none"> • <i>sui generis</i> property interest (derived from an interaction of the common law and pre-existing Indigenous laws) • native title is a right to the land itself (it is a <i>sui generis proprietary</i> interest in land) <p>a) Source: not derived from Crown grant; derived from the common law principle that occupation connotes possession and from pre-existing laws</p> <p>b) Relationship to Crown Title: a burden on the Crown's radical title</p> <p>c) Alienability: inalienable except by surrender/sale to the Crown</p> <p>d) Type of Landholding: Proprietary (a unique right to the land itself; personal <u>only</u> in the sense that it is inalienable except by surrender/sale to the Crown)</p>	<ul style="list-style-type: none"> • <i>sui generis</i> property interest (derived from Indigenous Peoples' traditional laws and customs and recognised by the common law) • native title is not a right to the land itself (it is <i>sui generis personal</i> interest in land with possible proprietary aspects) <p>a) Source: not derived from Crown grant; derived from traditional laws and customs</p> <p>b) Relationship to Crown Title: a burden on the Crown's radical title</p> <p>c) Alienability: inalienable except by surrender/sale to the Crown or as permitted by Indigenous laws and customs</p> <p>d) Type of Landholding: Personal (it does not constitute a legal or beneficial estate or interest in the actual land; it is not an equitable estate; it is a non-proprietary interest)</p> <p style="text-align: center;"><i>OR</i></p> <p>Proprietary (it may not be possible to admit traditional usufructuary rights without</p>

	CANADA	AUSTRALIA
	<p>e) Character of Land Holding: Communal (native title cannot be held by individual indigenous persons)</p> <p>f) Inherent Limit: lands held by virtue of native title cannot be used in a manner that is irreconcilable with the nature of the claimants' attachment to those lands</p> <p>g) Revival: native title is not capable of revival once extinguished (native title ceases following valid extinguishment); possibility of revival following a temporary loss can be inferred from the finding that a broken chain of continuity between present and pre-sovereignty occupancy will not normally preclude a claim for native title</p>	<p>admitting a traditional proprietary communal title practically equivalent to full ownership)</p> <p>e) Character of Landholding: Communal or Individual (ascertained according to the laws and customs of claimants); <i>OR</i> Native title is communal and the rights carved out of it are either communal or individual (depending on the laws and customs of the claimants)</p> <p>f) Inherent Limit: can be inferred from the finding that a communal native title enures for the benefit of the community as a whole and that the rights and benefits carved out of a communal native title are enforceable</p> <p>g) Revival: native title is not capable of revival once extinguished or lost (native title ceases following valid extinguishment and with the abandoning of those laws and customs from which occupancy and/or use – the source of native title - is derived)</p>
CONTENT	<ul style="list-style-type: none"> • native title confers a right of exclusive use and occupancy • native title confers a choice of uses to which the land may be put (such uses are not restricted to pre-contact practices but are subject to the inherent limit of native title) • lands held pursuant to native title have an inherent and unique value in and of themselves • lands held pursuant to native title have an inescapable economic component • native title includes mineral rights 	<ul style="list-style-type: none"> • native title confers an entitlement to use or enjoy the lands in question in accordance with traditional Indigenous laws and customs (native title's content must therefore be ascertained on a case-by-case basis)

	CANADA	AUSTRALIA
PROOF	<p><i>Delgamuukw Test:</i></p> <ol style="list-style-type: none"> 1. Occupancy at Sovereignty <ul style="list-style-type: none"> • physical presence is determined with reference to native title claimants' activities on and uses of the land in question as well as indigenous systems of law 2. Continuity Between Present and Pre-Sovereignty Occupation <ul style="list-style-type: none"> • a broken chain of continuity and/or a change in the nature of occupation will not normally preclude a claim for native title 3. Exclusive Occupancy at Sovereignty <ul style="list-style-type: none"> • joint title can arise from shared exclusivity 4. Geographic Specificity <ul style="list-style-type: none"> • native title claimants must identify the area(s) subject to their claims of continuing native title with some precision 	<p><i>Mabo Test:</i></p> <ol style="list-style-type: none"> 1. Identifiable Community <ul style="list-style-type: none"> • existence of a clan or group, the members of whom are biologically decedent from an Indigenous People and mutually identified as members of that community living under its traditional laws and customs 2. Maintenance of Traditional Laws and Customs <ul style="list-style-type: none"> • the clan or group must continue to acknowledge its traditional laws and (so far as practicable) continue to observe its traditional customs 3. Substantial Maintenance of a Traditional Connection to the Land <ul style="list-style-type: none"> • demonstrated through continued acknowledgment of traditional laws and continued observance of traditional customs related to the land 4. Occupancy <ul style="list-style-type: none"> • physical presence in accordance with traditional laws and customs at the time of the claim and a 'long time prior' may need to be demonstrated; joint occupancy can give rise to a form of joint native title
<i>Evidence</i>	<ul style="list-style-type: none"> • native title demands a unique approach to the treatment of evidence (indigenous perspectives must be accorded due weight) 	<ul style="list-style-type: none"> • no specific reference to the treatment of evidence in a native title claim per se, however: <ul style="list-style-type: none"> • a court may have to act on evidence which lacks specificity in determining the rights and interests of a sub-group of individual rights dependent on a communal native title (such rights are not precluded by an absence of a communal law to determine a point in contest between rival claimants)

	CANADA	AUSTRALIA
<i>Legal Context</i>	<ul style="list-style-type: none"> both the common law and 'indigenous perspectives on land' (derived in part from indigenous systems of law) must be taken into account in establishing proof of occupancy 	<ul style="list-style-type: none"> no specific reference to 'indigenous perspectives on land', however: <ul style="list-style-type: none"> the nature and incidents of native title must be determined by reference to pre-existing indigenous laws and customs native title does not have to conform to traditional common law concepts to be proven (it can be accepted as <i>sui generis</i>)
EXTINGUISHMENT	<p><i>Sovereignty to 1982:</i></p> <ul style="list-style-type: none"> clear and plain executive/ legislative intent required to extinguish native title prior to 1982 (native title not constitutionally entrenched; protected only by the common law). As a result: <ul style="list-style-type: none"> general 'Crown lands' legislation could not extinguish native title the reservation of land for Indigenous people could not extinguish native title the reservation of land by the Crown for a public purpose could not in and of itself extinguish native title (the use of this land for the public purpose in question, however, could result in the extinguishment of native title if this use was inconsistent with native title) ordinary legislation revealing a 'clear and plain intention' to extinguish native title could extinguish native title (to the extent of consistency) 	<p><i>Sovereignty to Present:</i></p> <ul style="list-style-type: none"> clear and plain executive/ legislative intent or clear and unambiguous words or necessary statutory implication required to extinguish native title (native title not constitutionally entrenched; protected only the common law), however: <ul style="list-style-type: none"> general 'waste lands' or 'Crown lands' legislation does not extinguish native title the reservation of land for Indigenous people does not extinguish native title the reservation of land by the Crown for a public purpose does not in and of itself extinguish native title (the use of this land for the public purpose in question will result in extinguishment if this use is inconsistent with native title) ordinary legislation revealing a 'clear and plain intention' to extinguish native title is subject to established common law principles, the <i>Constitution Act, 1900</i> and the <i>Racial Discrimination Act, 1975</i>

	CANADA	AUSTRALIA
<i>Jurisdiction to Extinguish</i>	<p>1982 to Present:</p> <ul style="list-style-type: none"> ordinary legislation could and can not extinguish native title from 1982 onwards (native title is constitutionally entrenched in sec. 35(1) of the <i>Constitution Act, 1982</i> and thus protected from unjustified infringement, including extinguishment) exclusive federal jurisdiction by virtue of sec. 91(24) of the <i>Constitution Act, 1867</i> (which gives the federal government exclusive jurisdiction over 'Indians, and Lands reserved for the Indians' protecting a 'core of Indianness' - which includes native title - from provincial intrusion) 	<ul style="list-style-type: none"> The following can also extinguish native title: <ul style="list-style-type: none"> a) inconsistent statutory grants to third parties (but pastoral leases do not necessarily extinguish native title); b) Crown appropriations (which extinguish native title to the extent of the inconsistency); c) a loss of connection to the lands held pursuant to native title through the abandoning of traditional laws and customs (however, the modification of traditional laws and customs will not necessarily result in the extinguishment of native title) d) the extinction of the relevant clan or group native title can be extinguished by valid Commonwealth, State or Territory legislation (the 'validity' of the legislation is dependent upon the statutory power to grant interests in land, which has varied across Australia over time)

	CANADA	AUSTRALIA
CURRENT PROTECTION	<p><i>sec. 35(1) of the Constitution Act, 1982:</i></p> <ul style="list-style-type: none"> protects 'aboriginal and treaty rights' (including the aboriginal right to land – i.e. 'native title') from unjustified infringement and unlawful extinguishment 	<p><i>sec. 51 (xxxi) of the Constitution Act, 1900 (Cth):</i></p> <ul style="list-style-type: none"> the Commonwealth Government may only acquire property on 'just terms'. (As a result, the extinguishment of native title by the Commonwealth is likely to require compensation.) <p><i>Racial Discrimination Act, 1975 (esp. sec. 9 and sec. 10):</i></p> <ul style="list-style-type: none"> sec. 9(1) – protects any human right (including the right to own property alone as well as in association with other, and to inherit property) from unequal recognition, enjoyment or exercise on the basis of race, colour, descent or national or ethnic origin. (As a result native title can not be denied or limited because it accrues only to Indigenous people.) sec. 10(1) – protects the enjoyment of human rights (including the right to own property alone as well as in association with others, and the right to inherit property) from arbitrary deprivation or more limited enjoyment on the basis of race, colour or national or ethnic origin. (As a result, native title can not be limited to a greater extent than 'ordinary' common law land rights.)

	CANADA	AUSTRALIA
INFRINGEMENT	<ul style="list-style-type: none"> native title (protected by sec. 35(1) of the <i>Constitution Act, 1982</i>) is not an absolute right and may, in certain cases, be justifiably infringed by government action 	<ul style="list-style-type: none"> in the absence of constitutional protection, the infringement of native title is equivalent to the extinguishment of native title <ul style="list-style-type: none"> native title may be infringed if it is 'wrongfully' extinguished (i.e. against the wishes of the native title-holders or by inconsistent grant, dedication or reservation); as an unentrenched <i>sui generis</i> title native title is susceptible to wrongful extinguishment
<i>Jurisdiction to Infringe</i>	<ul style="list-style-type: none"> native title may be infringed by both the federal and provincial governments (subject to a two-pronged justification test – see below) 	<ul style="list-style-type: none"> native title may be infringed/ extinguished by Commonwealth, State or Territory Governments
<i>Justification Test</i>	<ol style="list-style-type: none"> Compelling and Substantial Legislative Objective Required The range of legislative objectives that can justify an infringement of native title is fairly broad Infringement must be Consistent with the Special Fiduciary Relationship between the Crown and Aboriginal Peoples Three aspects of native title are relevant to the this aspect of the justification test: <ol style="list-style-type: none"> native title imparts the right to exclusive use and occupancy (this is relevant to the nature and extent of the infringing measure and to the degree of scrutiny that it will attract) native title imparts the right of choice of land uses (this is relevant to the Crown's duty of consultation) land held pursuant to native title has an inescapable economic component (this is relevant to issue of compensation) 	<ul style="list-style-type: none"> not applicable in the absence of entrenched protection

	CANADA	AUSTRALIA
FIDUCIARY DUTY OF THE CROWN	<ul style="list-style-type: none"> the Crown is subject to a fiduciary duty to treat Aboriginal people fairly 	<ul style="list-style-type: none"> indeterminate (the Crown may be subject to a fiduciary duty to Indigenous people)
<i>Source</i>	<ul style="list-style-type: none"> indeterminate, but because the fiduciary obligation is based on the historical relationship between the Crown and Aboriginal Peoples the following sources likely created fiduciary obligations to Aboriginal people on the part of the federal Crown: <ul style="list-style-type: none"> the Treaty of Utrecht (1713) the Capitulation of Montreal (1760) the Royal Proclamation of 1763 historic treaties sec. 91(24) of the Constitution Act, 1867 the Rupert's Land and the North-Western Territory Order (1870) and the Joint Address of the Parliament of Canada (1869) legislation concerning Quebec's boundaries (1898 and 1912) the James Bay and Northern Quebec Agreement and relevant implementing legislation the Indian Act the Constitution Act, 1982. the Crown's fiduciary duty also has roots in the native title of Canada's Aboriginal Peoples 	<ul style="list-style-type: none"> indeterminate
<i>Nature of the Fiduciary Duty</i>	<ul style="list-style-type: none"> the federal Crown's fiduciary obligations to Aboriginal people are by nature the same throughout Canada but the extent and scope of these obligations can vary because of the diversity of their sources fiduciary obligations probably also apply, in certain circumstances, to provincial Crowns 	<ul style="list-style-type: none"> indeterminate

	CANADA	AUSTRALIA
<p>NATIVE TITLE-HOLDERS' RIGHT TO CONSULTATION/ CONSENT</p> <p><i>Source</i></p>	<ul style="list-style-type: none"> • native title holders' right to choose to what uses native title lands may be put leads to their right to consultation in 'good faith', and possibly to their involvement and/or consent, when decisions are taken by others (i.e. governments) with respect lands held pursuant to native title (e.g. infringing legislation) • the right to consultation and involvement/consent is derived from the fiduciary duty of the Crown to Indigenous people 	<ul style="list-style-type: none"> • not applicable (probably due to an indeterminate fiduciary duty to Indigenous people on the part of the Crown)
<p>NATIVE TITLE-HOLDERS' RIGHT TO COMPENSATION</p> <p><i>Source</i></p>	<ul style="list-style-type: none"> • fair compensation will ordinarily be required when native title is infringed • the amount of compensation payable will vary with the nature of the particular native title affected, with the nature and severity of the infringement, and with the extent to which aboriginal interests were accommodated • the right to compensation is derived from the inescapable economic component of native title 	<ul style="list-style-type: none"> • indeterminate • the 'wrongful' extinguishment of native title may require the payment of compensation • Indeterminate. • Possible sources are: <ul style="list-style-type: none"> • sec. 51 (xxxii) of the <i>Constitution Act, 1900</i> (Cth) which requires the Commonwealth to provide 'just terms' on the acquisition of property; • the <i>Racial Discrimination Act (1975)</i> which protects native title from adverse discriminatory treatment; and/or; • the common law canon of construction which protects all persons against the 'wrongful' (i.e. without consent or compensation) appropriation of property by the Crown without the unequivocal expression of a 'clear and plain intention' to do so

	CANADA	AUSTRALIA
NATIVE TITLE VERSUS ABORIGINAL RIGHTS	<ul style="list-style-type: none"> • native title is one manifestation of and/or a distinct species of a broader-based conception of aboriginal rights <ul style="list-style-type: none"> • native title confers a right to the land itself; aboriginal rights can vary with respect to their degree of connection with the land • under the test for native title, the requirement that the land be integral to the distinctive culture of the claimants is subsumed by the requirement of occupancy; under the test for aboriginal rights, the rights claimed must be proven to be integral to the distinctive culture of the claimants • the relevant time period for the identification of native title is the time at which the Crown asserted sovereignty over the lands in question; the relevant time period for the identification of aboriginal rights is the time of first contact 	<ul style="list-style-type: none"> • native title subsumes aboriginal rights because: <ul style="list-style-type: none"> • the content, nature and incidents of native title will vary from one case to another dependent on the traditional laws and customs of the claimants • native title may comprise what are classified as personal and communal usufructuary rights or rights approximating a legal or equitable estate • native title may be an entitlement of an individual to a limited special use of land or it may be a community title which is practically equivalent to full ownership <p>OR</p> <ul style="list-style-type: none"> • A distinction between 'native title' and 'aboriginal rights' may be inferred from the finding that: <ul style="list-style-type: none"> • personal (i.e. non-proprietary) individual and/or subgroup rights dependent upon a communal native title may be derived from the community's laws and customs (those rights are, so to speak, carved out of the communal native title)

APPENDIX 3

Native Title (Federal Court) Regulation 1998 – Form 1. Native Title Determination Application – Claimant Application [Australia]

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Note 1: This form is to be used for an application mentioned in subsection 61(1) of the *Native Title Act, 1993* for a determination of native title in relation to an area for which there is no approved determination of native title

Note 2: Section 62 of the Act requires this application to be accompanied by an affidavit sworn by the application:

- (a) that the applicant believed that the native title rights and interests claimed by the native title group have not been extinguished in relation to any part of the area covered by the application; and
- (b) that the applicant believes that none of the area covered by the application is also covered by an entry in the National Native Title Register; and
- (c) that the applicant believes that all of the statements made in the application are true; and
- (d) that the applicant is authorised by all the persons in the native title claim group to make the application and to deal with matters arising in relation to it; and
- (e) stating the basis on which the applicant is authorised as mentioned in paragraph (d).

The application of [*name of applicant(s)*]

A. DETAILS OF THE CLAIM

1. The applicant applies for a determination of native title under subsection 61(1) of the *Native Title Act, 1993*.
2. The applicant is entitled to make this application as [*capacity in which the applicant claims to be entitled to make the application, eg. a person authorised by the native title claim group to make the native title determination application: see Act, s. 61(1)*].
3. The schedules to the application contain the following information:

Schedule A [see Act, s. 61]

The names (including Aboriginal names) of the persons (the **native title claimant group**) on whose behalf the application is made or a sufficiently clear description of the persons so that it can be ascertained whether any particular person is 1 of those persons.

Schedule B [see Act, s. 62]

Information identifying the boundaries of:

- (a) the area covered by the application; and
- (b) any areas within those boundaries that are not covered by the application.

(Note: this information must be included as well as the map mentioned in Schedule C.)

Schedule C [see Act, s. 62]

A map showing the boundaries of the area covered by the application.

Schedule D [see Act, s. 62]

Details and results of all searches carried out to determine the existence of any non-native title rights and interests in relation to the land or waters in the area covered by the application.

Schedule E [see Act, s. 62]

A description of the native title rights and interests claimed in relation to the particular land or waters (including any activities in exercise of those rights and interests). The description must not consist only of a statement to the effect that the native title rights and interests are all native title rights and interests that may exist, or that have not been extinguished, at law.

Schedule F [see Act, s. 62]

A general description of the native title rights and interests claimed and, in particular, the factual basis on which it is asserted that:

- (a) the native title claim group has, and the predecessors of those persons had, an association with the area; and
- (b) there exist traditional laws and customs that give rise to the claimed native title; and
- (c) the native title claims group has continued to hold the native title in accordance with those traditional laws and customs.

Schedule G [see Act, s. 62]

Details of any activities in relation to the land or waters currently carried on by the native title claim group.

Schedule H [see Act, s. 62]

Details of any other applications to the High Court, Federal Court or a recognised State/Territory body, of which the application is aware, that have been made in relation to the whole or a part of the area covered by the application and that seek a determination of native title or a determination of compensation in relation to native title.

Schedule I [see Act, s. 62]

Details of any notices under section 29 of the Act (or under a corresponding provision of a law of a State or Territory) [i.e. 'notification'], of which the application is aware, that have been given and that relate to the whole or a part of the area.

Schedule J

A draft of the order to be sought if the application is unopposed.

Schedule K

The name of each representative Aboriginal/Torres Strait Islander body for the area covered by the application.

Schedule L [see Act, ss. 47, 47A, 47B and 61A]

For the area covered by the application, details of:

- (a) any area for which a pastoral lease is held by or on behalf of the members of the native title claim group; and
- (b) any area leased, held or reserved for the benefit of Aboriginal peoples or Torres Strait Islanders that is occupied by or on behalf of the members of the native title claim group; and
- (c) any vacant crown land occupied by the members of the native title claim group; and
- (d) any area mentioned in paragraph (a), (b) or (c) over which the extinguishment of native title is required by section 47, 47A or 47B of the Act to be disregarded.

[The following items are not required but will be relevant when the Native Title Registrar considers the claim for registration under section 190A of the Act.]

Schedule M [see Act, s. 62]

Details of any traditional physical connection with any of the land or waters covered by the application by any member of the native title claim group.

Schedule N [see Act, s. 62]

Details of the circumstances in which any member of the native title claim group has been prevented from gaining access to any of the land or waters covered by the application.

Schedule O [see Act, s. 190C]

Details of the membership of the applicant or any member of the native title claim group in a native title claim group for any other application that has been made in relation to the whole or part of the area covered by this application.

Schedule P [see Act, s. 190B]

Details of any claim by the native title group of exclusive possession of all or part of an offshore place.

Schedule Q [see Act, s. 190B]

Details of any claim by the native title claim group of ownership of minerals, petroleum or gas wholly owned by the Crown.

Schedule R [see Act, s. 190C]

- (1) If the application has been certified by each representative Aboriginal/Torres Strait Islander body, a copy of the certificate.
- (2) If the application has not been certified by each representative Aboriginal/Torres Strait Islander body:
 - (a) a statement that the applicant is a member of the native title claim group and is authorised to make the application, and deal with matters arising in relation to it, by all the other persons in the native title claim group; and
 - (b) the grounds on which the Registrar should consider that statement correct.

Note: For the meaning of ***authorise***, see the Act, s. 251B.

Schedule S [see Act, s. 64]

If the application is an amended application, details of the difference between this application and the original application.

Schedule T

Any other relevant information that the applicant wants to provide.

Date: _____

[Signed by applicant or applicant's solicitor]

B. FILING AND SERVICE

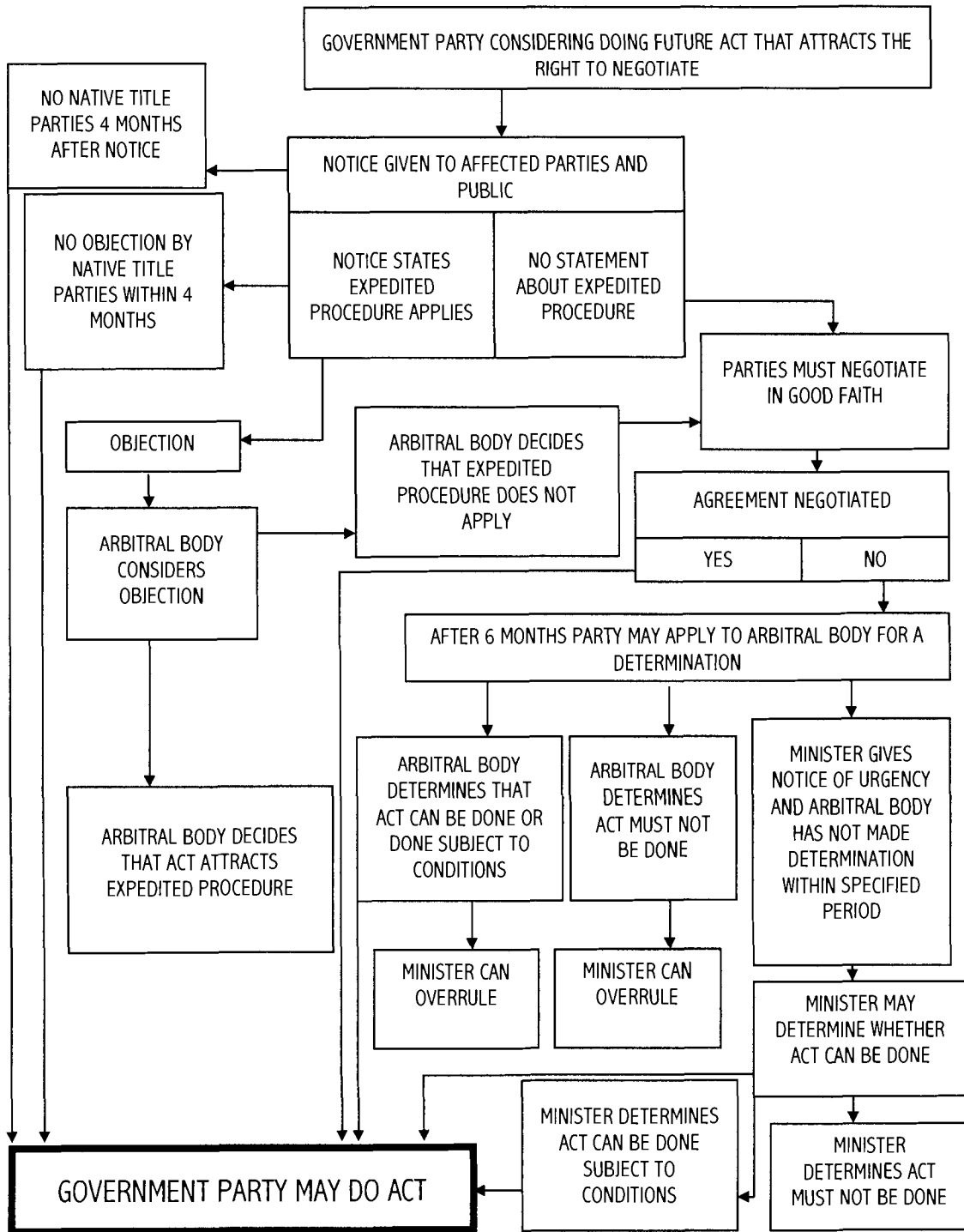
This application is filed by [name], whose address for service is [insert address].

This application is files for [name]. [Delete if applicant is unrepresented.]

The applicant's address is [place of residence or business].

APPENDIX 4

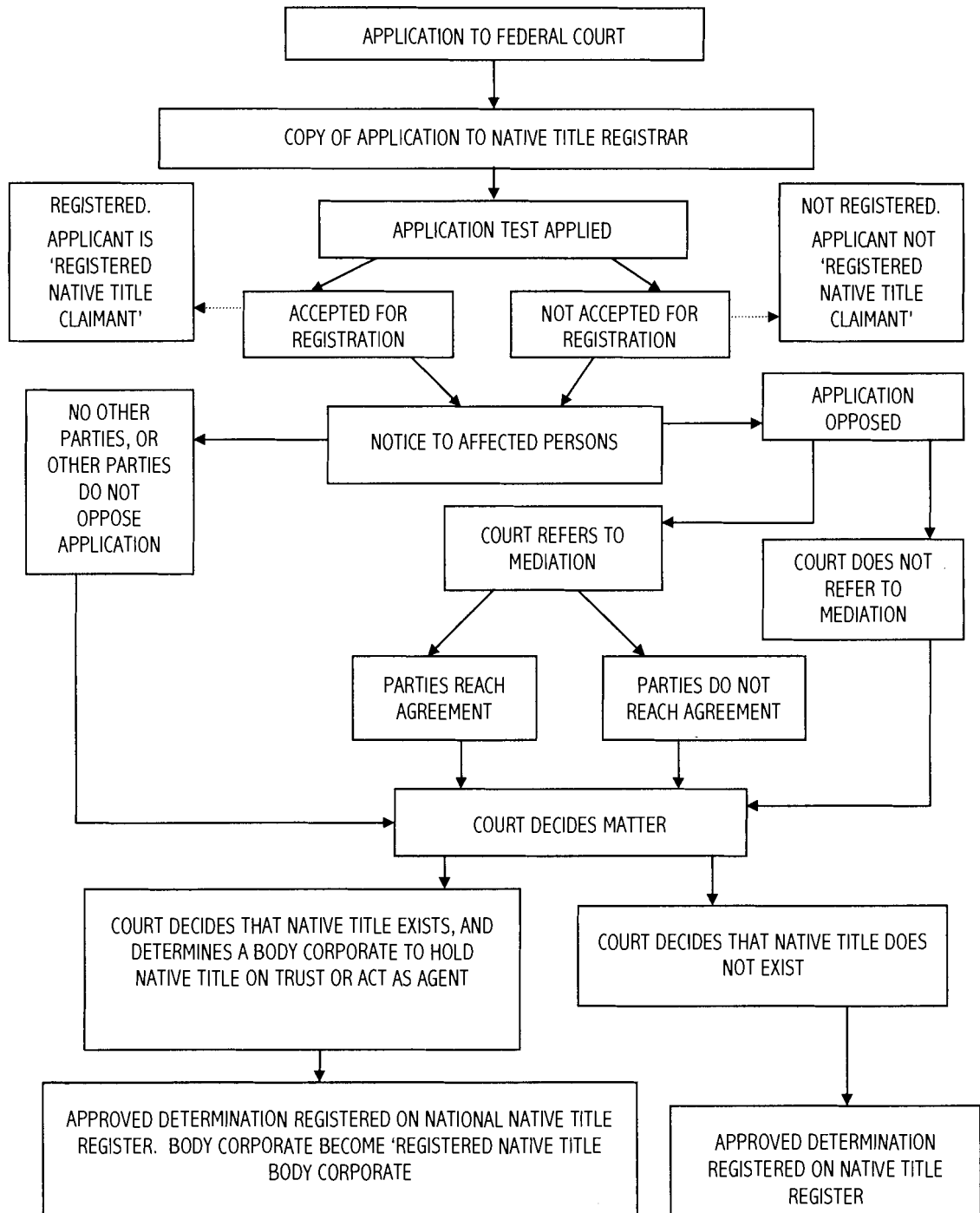
Overview of the Right to Negotiate Process [Australia]¹



¹ Source: Commonwealth of Australia, *Native Title: Native Title Act 1993 and Regulations with Commentary by the Australian Government Solicitor* (2nd ed; Canberra: Office of Legal Information & Publishing, 1998), p. 38. Reproduced with permission.

APPENDIX 5

Overview of the Claimant Process [Australia]²



² Source: Commonwealth of Australia, *Native Title: Native Title Act 1993 and Regulations with Commentary by the Australian Government Solicitor* (2nd ed; Canberra: Office of Legal Information & Publishing, 1998), p. 48. Reproduced with permission.

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